

United States
Circuit Court of Appeals
For the Ninth Circuit.

ATOLIA MINING COMPANY, a Corporation,
Plaintiff in Error,
vs.

HUMBOLDT COUNTY TUNGSTEN MINES
and MILLS COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. CHICKERING & GREGORY, Merchants
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Attorneys for Plaintiff.

JOHN F. DAVIS, Esq., Humboldt Bank Bldg.,
San Francisco, Calif., and

W. S. ANDREWS, Esq., Newhall Bldg., San Fran-
cisco, Calif.,
Attorneys for Defendant.

In the United States District Court, in and for the
Southern Division of the Northern District of
California, Second Division.

HUMBOLDT COUNTY TUNGSTEN MINES
AND MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINES COMPANY, a Corporation,
Defendant.

Complaint at Law.

Now comes plaintiff above named and complains
of defendant above named, and for its first cause of
action alleges the following:

I.

That plaintiff is, and at all times herein men-
tioned was, a corporation organized and existing
under and by virtue of the laws of the State of
Nevada, and having its principal place of business
in the City of Lovelock, County of Humboldt, said

State, and a citizen and resident of said State, and that defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, said State, and a citizen and resident of said State and Southern Division of the Northern District of California.

II.

That the grounds of jurisdiction of this court are diversity of citizenship and that the matter in controversy and the amount involved in this suit are in excess of the sum or value of three thousand (3,000) dollars, exclusive of interest and costs, to wit, the sum of eight thousand one hundred and fifty and $34/100$ (8,150.34) dollars, exclusive of interest and costs. [1*]

III.

That on or about the 29th day of November, 1918, in the said City of Lovelock, County of Humboldt, State of Nevada, plaintiff and defendant herein did make and enter into a contract in writing, wherein and whereby plaintiff did agree to sell and deliver to defendant and defendant did agree to purchase and receive from plaintiff a certain specified lot of that certain mineral commonly known as scheelite concentrates, located at the place of business of said plaintiff in the said City of Lovelock, and having a net weight of 11,893 pounds; that under and by virtue of the terms of said contract, defendant did promise and agree to pay plaintiff for said scheelite

*Page-number appearing at foot of page of original certified Transcript of Record.

concentrates at the following rate, to wit, twenty-one (21) dollars for each and every twenty (20) pounds of tungstic acid contained in said concentrates, and defendant did furthermore promise and agree that the following percentages of the total purchase price thereof would be paid by defendant to plaintiff at the following times, to wit, ninety per cent of the said total purchase price upon an assay by said defendant of samples to be taken from said concentrates and the remaining ten per cent of said purchase price upon the final assay by said defendant of said entire lot; that the terms, conditions and provisions hereinabove in this paragraph set forth constitute all the terms, conditions and provisions expressed in said written contract.

IV.

That subsequent to entering into said contract by plaintiff and defendant, and upon said 29th day of November, 1918, and in accordance with the terms of said contract, plaintiff did deliver to defendant and defendant did accept from plaintiff, at said place of business of plaintiff in the City of Lovelock, County of Humboldt, State of Nevada, said 11,893 pounds of said scheelite concentrates.

V.

That said 11,893 pounds of said scheelite concentrates [2] contained at all times herein mentioned 7,762.238 pounds of said tungstic acid.

VI.

That said plaintiff is informed and believes and therefore alleges that immediately subsequent to said delivery of said scheelite concentrates to de-

fendant, defendant did take and assay samples from said 11,893 pounds of said scheelite concentrates and that furthermore, subsequent to said assay of said samples and prior to the commencement of the above-entitled action, defendant did assay said entire lot of said scheelite concentrates and that both upon said assay of said samples and upon said assay of said entire lot, said 11,893 pounds of said scheelite concentrates were found by defendant to contain 7,762.238 pounds of said tungstic acid.

VII.

That upon said assay of said samples there became due and owing, under and by virtue of the terms of said contract, from said defendant to said plaintiff, ninety per cent of said purchase price, to wit, the sum of seven thousand three hundred and thirty-five and $31/100$ (7,335.31) dollars, and that upon said final assay of scheelite concentrates there became due and owing, in accordance with the terms of said contract, from said defendant to said plaintiff, the balance of said purchase price, to wit, the sum of eight hundred and fifteen and $3/100$ (815.03) dollars.

VIII.

That plaintiff has performed each and all of the terms, conditions and provisions of said contract to be kept and performed by said plaintiff.

IX.

That subsequent to said assay of said entire lot of said scheelite concentrates, and prior to the commencement of the above-entitled action, plaintiff demanded of defendant that defendant pay [3]

to plaintiff the total amount due plaintiff for and on account of said sale and delivery of said scheelite concentrates, to wit, the sum of eight thousand one hundred and fifty and $34/100$ (8,150.34) dollars, but that at said time said defendant refused, and ever since said time has refused and still refuses to pay plaintiff said sum or any part thereof, and that the same has not been paid nor has any part thereof been paid, and that the whole thereof, with interest thereon at the legal rate from the commencement of the above-entitled action is now due, owing and unpaid from defendant to plaintiff.

AND FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION, plaintiff alleges:

I.

Plaintiff at this point refers to and by such reference incorporates herein paragraphs I and II of the first cause of action in this complaint contained, and each and every allegation thereof, as fully and to the same effect as if here rewritten and set forth at length.

II.

That on or about the 29th day of November, 1918, in the said City of Lovelock, County of Humboldt, State of Nevada, plaintiff did sell and deliver to defendant and defendant did receive and purchase from plaintiff a certain specified lot of that certain mineral commonly known as scheelite concentrates, located at the place of business of said plaintiff in said City of Lovelock, and having a net weight of 11,893 pounds; that for and in consideration of said

sale and transfer by plaintiff to defendant of said 11,893 pounds of said scheelite concentrates, defendant did in writing promise and agree as follows, to wit, that *plaintiff* would pay for said scheelite concentrates at the rate of twenty-one (21) dollars [4] for each and every twenty (20) pounds of tungstic acid contained in said concentrates, and furthermore that defendant would pay the following percentages of the total purchase price at the following times, to wit, ninety per cent of the said total purchase price upon an assay by said defendant of samples to be taken from said concentrates, and the remaining ten per cent of said purchase price upon the final assay by said defendant of said entire lot.

III.

Plaintiff at this point refers to and by such reference incorporates herein paragraphs V, VI, VII and IX of the first cause of action in this complaint contained, and each and every allegation thereof, as fully and to the same effect as if here rewritten and set forth at length.

AND FOR A THIRD, SEPARATE AND DISTINCT CAUSE OF ACTION, plaintiff alleges:

I.

Plaintiff at this point refers to and by such reference incorporates herein paragraphs I and II of the first cause of action in this complaint contained, and each and every allegation thereof, as fully and to the same effect as if here rewritten and set forth at length.

II.

That on or about the 29th day of November, 1918, plaintiff did sell and deliver to defendant, at the special instance and request of defendant, certain goods, wares and merchandise, as follows, to wit, 11,893 pounds of that certain mineral commonly known as scheelite concentrates; that said goods, wares and merchandise were and are reasonably worth the sum of eight thousand one hundred and fifty and $34/100$ (8,150.34) dollars. [5]

III.

That although payment of said sum of eight thousand one hundred and fifty and $34/100$ (8,150.34) dollars has been often demanded, the same has not been paid, nor has any part thereof been paid, and the whole thereof, with interest thereon at the legal rate from the commencement of the above-entitled action is now due, owing and unpaid from defendant to plaintiff.

WHEREFORE plaintiff prays judgment against defendant for the sum of eight thousand one hundred and fifty and $34/100$ (8,150.34) dollars, together with interest thereon at the legal rate from the commencement of the above-entitled action and for its costs of suit herein.

CHICKERING & GREGORY,
Attorneys for Plaintiff. [6]

State of California,
City and County of San Francisco,—ss.

Donald Y. Lamont, being first duly sworn, deposes and says:

That he is a member of the law firm of Chickering

& Gregory, the attorneys for the plaintiff named in the foregoing complaint; that said plaintiff is a foreign corporation and said plaintiff and its officers and agents are absent from the State and Northern District of California and from the City and County of San Francisco, the place where said attorneys have their offices, and for that reason affiant makes this affidavit on plaintiff's behalf; that affiant has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

DONALD Y. LAMONT.

Subscribed and sworn to before me, this 5th day of May, 1919.

[Notarial Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires April 7, 1922.

[Endorsed]: Filed May 5, 1919. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

In the United States District Court, in and for the
Southern Division of the Northern District of
California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES
AND MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINES COMPANY, a Corporation,
Defendant.

Answer to Complaint at Law.

That defendant Atolia Mining Company, a California corporation, sued herein as Atolia Mines Company, hereby appears and answers the complaint filed in the above-entitled action and for ANSWER TO THE FIRST CAUSE OF ACTION herein alleged, denies, admits and alleges as follows:

I.

Said defendant admits all of the allegations set forth in paragraph I of said complaint.

II.

Said defendant admits all of the allegations set forth in paragraph II of said complaint.

III.

Said defendant denies that on or about the 29th day of November, 1918, or at any other time, in the City of Lovelock, County of Humboldt, State of Nevada, or anywhere else, plaintiff and defendant

herein did make or enter into a contract in writing, or otherwise, wherein or whereby plaintiff did agree to sell or deliver to defendant, or that defendant did agree to purchase or receive from plaintiff, a certain specified or any lot of certain mineral commonly known as scheelite concentrates, located at the place of business of said plaintiff in said City of Lovelock, or elsewhere, or having a net or other weight of 11,893, or any other number of, pounds, or any concentrates at all. And in this [8] behalf said defendant denies that it ever entered into any agreement of any kind with plaintiff whatever. Said defendant denies that under or by virtue of the terms of the contract alleged in said complaint, or under or by virtue of the terms of any contract, defendant did purchase, or agree to pay to plaintiff for, the said scheelite concentrates set forth in said complaint, or for any scheelite concentrates, at the rate of twenty-one, or any other number of, dollars for each and every twenty pounds of tungstic acid contained in said concentrates, or that defendant did further promise or agree that the percentages of the total alleged purchase price thereof, to wit, ninety or any per cent of said total purchase price upon an assay of said defendant of samples to be taken from said concentrates and the remaining ten or other per cent of said purchase price upon the final assay of said defendant upon said entire lot, would be paid by defendant to plaintiff at the times set forth in said paragraph of said complaint, and in this behalf said defendant denies that it ever did promise or agree to pay said plaintiff any amount

of dollars for any number of pounds of tungstic acid contained in any concentrates, or that it ever agreed to pay defendant any percentages of any purchase price thereof at any time. Said defendant denies that the terms or conditions or provisions set forth in said paragraph three of said complaint constitute all or any of the terms or conditions or provisions expressed in any written contract therein attempted to be set forth, or that there was any written or other contract whatever.

IV.

Said defendant denies that subsequent to the entering into said alleged contract by plaintiff and defendant, or subsequent to any contract, or upon the 29th day of November, 1918, or at any other time, or in accordance with the terms of said alleged contract, or otherwise, or at all, plaintiff did deliver to defendant, [9] or defendant did accept from plaintiff, at said place of business of plaintiff in the City of Lovelock, County of Humboldt, State of Nevada, or any other place, said alleged 11,893 pounds of said scheelite concentrates, or any other amount of scheelite concentrates whatever.

V.

That as to said 11,293 pounds of said scheelite concentrates mentioned in paragraph five of plaintiff's complaint as containing at all times therein set forth 7762.238 pounds of tungstic acid, this defendant has no information or belief sufficient to enable it to deny said allegation, and basing its denial upon said ground, this defendant, therefore, denies that the said 11,893 pounds of said scheelite

concentrates set forth in paragraph V of said complaint contained at all times mentioned in said complaint or at any time 7762.238, or any other number of, pounds of tungstic acid.

VI.

Said defendant denies that plaintiff ever delivered to defendant the scheelite concentrates or any portion thereof mentioned in said complaint; defendant denies that subsequent to said alleged delivery, or at any time, except as herein stated, it did take an assay or take or assay samples from said 11,893 pounds, or any portion thereof, of said scheelite concentrates, and denies that subsequent to said alleged assay of said samples or prior to the commencement of the above-entitled action, defendant, except as herein stated, assayed said entire lot of said scheelite concentrates or any portion thereof, and denies that both upon said alleged assay of said samples and upon said alleged assay of said entire lot or upon an assay of either of them that said 11,893 pounds or any portion thereof of said scheelite concentrates were found by defendant to contain 7762.238 pounds of said tungstic acid or any portion thereof, except as herein stated, and defendant in [10] this connection denies that it made any assay whatever of any scheelite concentrates purchased by it from said plaintiff, or that it ever purchased any concentrates from said plaintiff.

VII.

Defendant denies that upon said alleged assay of said samples, or at any time, there became due and

owing or due or owing under and by virtue or under or by virtue of the terms of said alleged contract or at all from said defendant to said plaintiff ninety per cent of said alleged purchase price, to wit, the sum of \$7335.31 or any sum whatever, and denies that upon said alleged final assay of scheelite concentrates or at any time there became due and owing or due or owing, in accordance with the terms of said alleged contract, or at all, from said defendant to said plaintiff, the balance of said alleged purchase price, to wit, the sum of \$815.03, or any sum whatsoever.

VIII.

Defendant denies that plaintiff has performed each and all of the terms, conditions and provisions or terms or conditions or provisions of the said alleged contract to be kept and performed or to be kept or performed by said plaintiff, and denies that plaintiff and defendant ever entered into any agreement covering the purchase of any scheelite concentrates from plaintiff.

IX.

Defendant denies that any sum of money whatsoever is due from it to the plaintiff.

ANSWER TO SECOND ALLEGED CAUSE OF ACTION.

Answering the second cause of action of said plaintiff defendant admits, denies and alleges as follows, to wit:

I.

Defendant denies that on or about the 29th day of

November, [11] 1918, or at any time, in said City of Lovelock, County of Humboldt, State of Nevada, or at any place, plaintiff sold or delivered to defendant, and denies that defendant received and purchased, or received or purchased, from plaintiff, a certain specified lot of that certain mineral commonly known as scheelite concentrates, located at the place of business of said plaintiff in said City of Lovelock, and having a net weight of 11,893 pounds or any amount of weight whatever; denies that it ever purchased or received from plaintiff any scheelite concentrates whatever at any time or place; denies that for or in consideration of said alleged sale and transfer, or said sale or transfer, by plaintiff to defendant of said 11,893 pounds, or any portion thereof, of said scheelite concentrates, defendant did in writing, or otherwise, promise and agree, or promise or agree, that it would pay for said scheelite concentrates at the rate of twenty-one dollars or any other sum for each and every twenty pounds or any amount thereof of tungstic acid contained in said concentrates, and furthermore denies that it agreed to pay any sum of money whatever at any time for said concentrates, and denies that it ever entered into any agreement with the plaintiff for the purchase of any concentrates whatsoever from the plaintiff.

II.

Defendant refers to and by such reference incorporates herein paragraphs five, six, seven and nine of the answer to the first cause of action in this answer contained and each and every allegation

thereof as fully and to the same effect as if here re-written and set forth at length.

ANSWER TO THIRD ALLEGED CAUSE OF ACTION.

Answering the third cause of action defendant admits, denies and alleges as follows:

I.

Defendant denies that on or about the 29th day of November, [12] 1918, or at any time, plaintiff sold and delivered, or sold or delivered, to defendant at its special instance and request, or at its special or other instance or request, certain goods, wares and merchandise or certain goods, wares or merchandise, as follows, to wit, 11,893 pounds of that certain mineral commonly known as scheelite concentrates or any portion thereof; and denies that it ever purchased from plaintiff any goods, wares or merchandise whatsoever; denies that said goods, wares and merchandise alleged in said complaint were and are, or were or are, reasonably worth the sum of \$8150.34 or any sum whatsoever.

II.

Denies that the sum of \$8150.34 or any portion thereof or any interest thereon is now due or owing from the defendant to the plaintiff.

FIRST SEPARATE CAUSE OF DEFENSE.

And for a separate defense to the complaint herein and to each count thereof defendant alleges as follows:

I.

The defendant is a corporation organized and ex-

isting under and by virtue of the laws of the State of California and having its principal place of business in the City of San Francisco in said State, and that its correct name is Atolia Mining Company.

II.

That defendant is informed and believes and therefore alleges that plaintiff is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and having its principal place of business in the City of Lovelock, County of Humboldt, in said State.

III.

That defendant is informed and believes and therefore alleges [13] that some time in the month of November, 1918, the plaintiff entered into an agreement with one W. H. Shewan whereby the said Shewan purchased from the plaintiff the scheelite concentrates referred to in said complaint herein, and that the said agreement of sale referred to in said complaint herein and each count thereof was entered into between said plaintiff and said Shewan and not between said plaintiff and defendant; that defendant is informed and believes and therefore alleges that prior to the making of said agreement as aforesaid between said plaintiff and said Shewan, in order to induce said Shewan to enter into said agreement, said plaintiff represented to said Shewan that the scheelite concentrates referred to in said complaint and which plaintiff desired to sell to said Shewan contained more than sixty per cent (60%)

of tungstic acid and that said scheelite concentrates were absolutely free from all impurities including phosphorus, sulphur and copper, and that said Shewan could rely upon said representation; that said plaintiff was engaged in the business of milling tungsten ore and was in a position to know the quality of the ore it was offering for sale; that at the time said plaintiff made said representation it had no reasonable ground for believing said representation to be true; that at the time it made said representation plaintiff knew that said representation was not true and that said tungsten ore was not free from impurities and that it did not contain more than sixty per cent (60%) of tungstic acid; that said Shewan relying upon said representation of plaintiff then purchased said scheelite concentrates from said plaintiff; that said Shewan informed the plaintiff at the time that said representations were made, as aforesaid, that he, said Shewan, intended to sell said ore when purchased to the defendant and that defendant would not purchase said ore from him unless it were free from impurities and contained over sixty per cent (60%) of tungstic acid; that said [14] plaintiff made the aforesaid representations knowing that the defendant would rely thereon in purchasing said scheelite concentrates from said Shewan; that said defendant did purchase said scheelite concentrates from said Shewan relying upon the aforesaid representation made by said plaintiff to said Shewan.

That thereafter said plaintiff delivered to said Shewan the scheelite concentrates referred to in the

complaint herein who in turn sold and delivered the same to defendant, and after said scheelite concentrates were received by defendant an assay thereof was made, and it was then discovered that they contained a large percentage of phosphorus, sulphur and copper; that immediately thereafter said plaintiff was notified that said scheelite concentrates were not in accordance with the representation and warranty of the plaintiff and that the said sale was rescinded and that the said plaintiff could have the return of said scheelite concentrates upon the payment by said plaintiff of the freight incurred in transporting said scheelite concentrates.

SECOND SEPARATE CAUSE OF DEFENSE.

And for a separate defense to the complaint herein and to each count thereof defendant alleges as follows:

I.

That defendant is a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the City and County of San Francisco in said State, and that its correct name is Atolia Mining Company.

II.

That defendant is informed and believes and therefore alleges that plaintiff is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and having its principal place of business in the [15] City of Lovelock, County of Humboldt, in said State.

III.

That defendant is informed and believes and therefore alleges that some time in the month of November, 1918, the plaintiff entered into an agreement with one W. H. Shewan whereby the said Shewan purchased from said plaintiff the scheelite concentrates referred to in said complaint herein, and that the said agreement of sale referred to in said complaint herein and each count thereof was entered into between said plaintiff and said Shewan and not between said plaintiff and defendant; that defendant is informed and believes and therefore alleges that prior to the making of said agreement as aforesaid between said plaintiff and said Shewan, in order to induce said Shewan to enter into said agreement, said plaintiff represented to said Shewan that the scheelite concentrates referred to in said complaint and which plaintiff desired to sell to said Shewan contained more than sixty per cent (60%) of tungstic acid and that said scheelite concentrates were absolutely free from all impurities including phosphorus, sulphur, and copper, and that said Shewan could rely upon said representation; that said plaintiff was engaged in the business of milling tungsten ore and was in a position to know the quality of the ore it was offering for sale; that at the time said plaintiff made said representation it had no reasonable ground for believing said representation to be true; that at the time it made said representation plaintiff knew that said representation was not true and that said tungsten ore was not free from

impurities and that it did not contain more than sixty per cent (60%) of tungstic acid; that said Shewan relying upon said representation of plaintiff then purchased said scheelite concentrates from said plaintiff; that said Shewan informed the plaintiff at the time that said representations were made, as aforesaid, that he, said [16] Shewan, intended to sell said ore when purchased to the defendant and that defendant would not purchase said ore from him unless it were free from impurities and contained over sixty per cent (60%) of tungstic acid; that said plaintiff made the aforesaid representation knowing that the defendant would rely thereon in purchasing said scheelite concentrates from said Shewan; that said defendant did purchase said scheelite concentrates from said Shewan relying upon the aforesaid representation made by said plaintiff to said Shewan.

That thereafter said plaintiff delivered to said Shewan the scheelite concentrates referred to in the complaint herein who in turn sold and delivered the same to defendant, and after said scheelite concentrates were received by defendant an assay thereof was made and it was then discovered that they contained a large percentage of phosphorus, sulphur and copper and contained less than sixty per cent (60%) of tungstic acid;

That by reason of the foregoing the defendant has been damaged in the sum of Ten Thousand Dollars.

THIRD SEPARATE CAUSE OF DEFENSE.

And for a separate defense to the complaint here-

in and to each count thereof defendant alleges as follows:

I.

That defendant is a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the City and County of San Francisco in said State, and that its correct name is Atolia Mining Company.

II.

That defendant is informed and believes and therefore alleges that plaintiff is and at all times herein mentioned was a corporation [17] organized and existing under and by virtue of the laws of the State of Nevada and having its principal place of business in the City of Lovelock, County of Humboldt, in said State.

III.

That defendant is informed and believes and therefore alleges that sometime in the month of November, 1918, the plaintiff entered into an agreement with one W. H. Shewan whereby the said Shewan purchased from said plaintiff the scheelite concentrates referred to in the complaint herein, and that the said agreement of sale referred to in said complaint herein and each count thereof was entered into between said plaintiff and said Shewan and not between said plaintiff and defendant, though it is the contention and position of the plaintiff that the said Shewan was acting as an agent for this defendant; that defendant is informed and believes and therefore alleges that

prior to the making of said agreement as aforesaid between said plaintiff and said Shewan, in order to induce said Shewan to enter into said agreement, said plaintiff represented to said Shewan that the scheelite concentrates referred to in said complaint and which plaintiff desired to sell to said Shewan contained more than sixty per cent (60%) of tungstic acid and that said scheelite concentrates were absolutely free from all impurities including phosphorous, sulphur and copper, and that said Shewan could rely upon said representation; that said plaintiff was engaged in the business of milling tungsten ore and was in a position to know the quality of the ore it was offering for sale; that at the time said plaintiff made said representation it had no reasonable ground for believing said representation to be true; that at the time it made said representation plaintiff knew that said representation was not true and that said tungsten ore was not free from impurities and that it did not contain more than sixty per cent (60%) of tungstic acid; that said Shewan relying [18] upon said representation of plaintiff then purchased said scheelite concentrates from said plaintiff.

That thereafter said plaintiff delivered to said Shewan the scheelite concentrates referred to in the complaint herein who in turn sold and delivered the same to defendant, and after said scheelite concentrates were received by defendant an assay thereof was made, and it was then discovered that they contained a large percentage of phos-

phorus, sulphur and copper; that immediately thereafter said plaintiff was notified that said scheelite concentrates were not in accordance with the representation and warranty of the plaintiff and that the said sale was rescinded and that the said plaintiff could have the return of said scheelite concentrates upon the payment by said plaintiff of the freight incurred in transporting said scheelite concentrates.

That it is the contention of plaintiff herein that said Shewan was the agent of said defendant and that acting on behalf of this defendant purchased said scheelite concentrates from said plaintiff; that defendant alleges that said Shewan at no time acted as its agent and defendant alleges that at no time was said Shewan authorized to represent it or to make any contract with the plaintiff or anyone else on its behalf; that said Shewan did not enter into any agreement with plaintiff on behalf of defendant; that in the event, however, that plaintiff's contention that said Shewan was the agent of said defendant and entered into said agreement as set forth in said complaint on behalf of said defendant should be sustained, defendant presents as a defense to said complaint and to each cause of action contained therein the aforesaid misrepresentation and the rescission of said contract of sale as hereinbefore set forth.

FOURTH SEPARATE CAUSE OF DEFENSE.

And for a separate defense to the complaint herein and to each count thereof defendant alleges as follows: [19]

I.

That defendant is a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the City and County of San Francisco in said State, and that its correct name is Atolia Mining Company.

II.

That defendant is informed and believes and therefore alleges that plaintiff is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and having its principal place of business in the City of Lovelock, County of Humboldt, in said State.

III.

That defendant is informed and believes and therefore alleges that some time in the month of November, 1918, the plaintiff entered into an agreement with one W. H. Shewan whereby the said Shewan purchased from said plaintiff the scheelite concentrates referred to in said complaint herein, and that the said agreement of sale referred to in said complaint herein and each count thereof was entered into between said plaintiff and said Shewan and not between said plaintiff and defendant, though it is the contention and position of the plaintiff that the said Shewan was acting as an agent for this defendant; that defendant is informed and believes and therefore alleges that prior to the making of said agreement as aforesaid between said plaintiff and said Shewan, in order to

induce said Shewan to enter into said agreement, said plaintiff represented to said Shewan that the scheelite concentrates referred to in said complaint and which plaintiff desired to sell to said Shewan contained more than sixty per cent (60%) of tungstic acid and that said scheelite concentrates were absolutely free from all impurities including phosphorus, sulphur and copper, [20] and that said Shewan could rely upon said representation; that said plaintiff was engaged in the business of milling tungsten ore and was in a position to know the quality of the ore it was offering for sale; that at the time said plaintiff made said representation it had no reasonable ground for believing said representation to be true; that at the time it made said representation plaintiff knew that said representation was not true and that said tungsten ore was not free from impurities and that it did not contain more than sixty per cent (60%) of tungstic acid; that said Shewan relying upon said representation of plaintiff then purchased said scheelite concentrates from said plaintiff;

That thereafter said plaintiff delivered to said Shewan the scheelite concentrates referred to in the complaint herein who in turn sold and delivered the same to defendant, and after said scheelite concentrates were received by defendant an assay thereof was made and it was then discovered that they contained a large percentage of phosphorus, sulphur and copper and contained less than sixty per cent (60%) of tungstic acid.

That by reason of the foregoing the defendant has been damaged in the sum of Ten Thousand Dollars (\$10,000.00).

That it is the contention of plaintiff herein that said Shewan was the agent of said defendant and that acting on behalf of this defendant purchased said scheelite concentrates from said plaintiff; that defendant alleges that said Shewan at no time acted as its agent and defendant alleges that at no time was said Shewan authorized to represent it or to make any contract with the plaintiff or anyone else on its behalf; that said Shewan did not enter into any agreement with plaintiff on behalf of defendant; that in the event, however, that plaintiff's contention that said Shewan was the agent of said defendant and entered into said agreement as set forth in said complaint on behalf of said defendant should be sustained, defendant presents as a defense to said complaint and to each cause of action contained therein [21] the aforesaid misrepresentation and the breach thereof and the damages therein sustained as hereinabove set forth.

WHEREFORE defendant prays that it be hence dismissed with its costs.

JOHN A. DAVIS,
Attorney for Defendant.

W. S. ANDREWS,
Of Counsel. [22]

State of California,
City and County of San Francisco,—ss.

E. A. Stent, being duly sworn, deposes and says:

That he is an officer, to wit, the Secretary of the Atolia Mining Company, a corporation, and that he is duly authorized to make and does make this affidavit and verification on its behalf; that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

E. A. STENT.

Subscribed and sworn to before me this 14th day of August, 1919.

[Notarial Seal] J. D. BROWN,
Notary Public in and for the City and County of
San Francisco, State of California.

Received a copy of the within answer to complaint at law, this 15th day of August, 1919.

Dated August 15, 1919.

CHICKERING & GREGORY,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 15, 1919. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[23]

(Title of Court and Cause.)

(Stipulation Waiving Jury.)

IT IS HEREBY STIPULATED by and between the respective parties hereto that the above-entitled cause may be tried by the above-entitled

court, sitting without a jury, during the July term.

Dated July 27, 1920.

CHICKERING & GREGORY,

Attorneys for Plaintiff.

JOHN F. DAVIS and

W. S. ANDREWS,

Attorneys for Defendant.

It is so ordered.

WM. H. SAWTELLE,

Judge.

[Endorsed]: Filed July 27, 1920. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

[24]

(Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial upon the 10th day of May, 1921, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed, Donald Y. Lamont, Esq., appearing as attorney for plaintiff and John F. Davis and W. S. Andrews, Esqrs., appearing as attorneys for defendant and the trial having been proceeded with on the 11th day of May, 1921, and oral and documentary evidence having been introduced on behalf of the respective parties, and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having ordered that judgment be entered in favor of the

plaintiff and against the defendant in the sum of \$9,300.90 and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Humboldt County Tungsten Mines and Mills Company, a corporation, plaintiff, do have and recover of and from Atolia Mining Company, a corporation, defendant, the sum of Nine Thousand Three Hundred and 90/100 (\$9,300.90) Dollars, together with its costs herein expended taxed at \$151.45.

Judgment entered May 11, 1921.

WALTER B. MALING,
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk.

[Endorsed]: Filed May 11, 1921. Walter B. Maling, Clerk. [25]

(Title of Court and Cause.)

(Clerk's Certificate to Judgment-roll.)

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 11th day of May, 1921.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed May 11, 1921. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[26]

(Title of Court and Cause.)`

(Subpoena.)

The President of the United States of America to
E. C. Voorheis, GREETING:

YOU ARE HEREBY REQUIRED, that all and singular business and excuses being set aside, you appear and attend before the Southern Division of the United States District Court for the Northern District of California, Second Division, to be held at the courthouse of said court, room No. 304, in the United States Postoffice and Courthouse Building, situate on the northeast corner of Seventh and Mission Streets, in the City and County of San Francisco, State of California, on the 10th day of May. A. D. 1921, at ten o'clock A. M., then and there to testify in the above-named cause, now pending in said court, on the part of the above-named plaintiff, and then and there have and then and there bring with you the following, namely:

1. Telegram sent by W. H. Shewan from Lovelock, Nevada, to E. C. Voorheis, bearing date November 21, 1918, in words and figures as follows: "Can buy twelve tons sixty per cent and better for twenty-one fifty per unit f. o. b. Toulon ninety per cent on bill of lading. Answer."
2. Copy of reply of said E. C. Voorheis to said last-mentioned telegram, authorizing purchase, which said reply bears date November 22, 1918.
3. Check sent by defendant to W. H. Shewan and signed by said defendant, in the sum of \$7,733.25, which said check bears date February 5, 1919.
4. Copy of letter bearing date February 5, 1919, from E. C. Voorheis to said W. H. Shewan, accompanying said last-mentioned check.
5. Check stub of defendant, showing the drawing of said last-mentioned check by said defendant.
6. Copy of telegram bearing date of February 17, 1919, from said E. C. Voorheis to said W. H. Shewan, addressed to Lovelock, Nevada, instructing the said Shewan to hold up payment to plaintiff.
7. Telegram from plaintiff to said E. C. Voorheis, bearing date March 10, 1919, asking when plaintiff may expect settlement on shipment of concentrates. [27]

8. Telegram bearing date March 19, 1919, from L. A. Savage to said E. C. Voorheis, inquiring whether concentrates have been mixed.
9. Letter from plaintiff to defendant, bearing date March 22, 1919, in reply to letter of March 11, 1919.
10. Statement of account contained in last-mentioned letter.

And for a failure to attend as above required, you will be deemed guilty of contempt of Court, and liable to pay to the party aggrieved all loss and damages sustained thereby.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 7th day of May, in the year of our Lord one thousand nine hundred and twenty-one, and of our Independence the 145th.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

MARSHAL'S RETURN.

I have served this writ by copy on A. C. Voorheis, Humboldt Bank Bldg., San Francisco, this 9th day of May, 1921.

J. B. HOLOHAN,

U. S. Marshal.

Chas. Ghun,

Deputy.

[Endorsed]: Filed May 9, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

(Title of Court and Cause.)

**Stipulation and Order Re Serving and Filing Bill of
Exceptions.**

It is stipulated by and on behalf of plaintiff that defendant may be given 20 days' further time within which to make, serve and file its bill of exceptions herein.

Dated: May 23d, 1921.

CHICKERING & GREGORY,
Attorneys for Plaintiff.

Good cause appearing herefor, the defendant is hereby granted twenty days' further time within which to make, serve and file its bill of exceptions herein.

Dated: May 23, 1921.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed May 26, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

(Title of Court and Cause.)

**Stipulation and Order Re Serving and Filing Bill of
Exceptions.**

It is stipulated by and on behalf of plaintiff that defendant may be given 15 days' further time from and after the 12th day of June, 1921, within which to make, serve and file its proposed bill of exceptions herein.

Dated: June 8th, 1921.

CHICKERING & GREGORY,
Attorneys for Plaintiff.

Good cause appearing herefor, the defendant is hereby granted fifteen days' further time from and after the 12th day of June, 1921, within which to make, serve and file its proposed bill of exceptions herein.

Dated: June 18th, 1921.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed June 8, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

(Title of Court and Cause.)

**Order Extending Time Beyond Term of Court for
Settlement of Bill of Exceptions.**

It appearing that the defendant herein has prepared, served and lodged with the clerk of this court its proposed bill of exceptions herein pursuant to the statute and the rules of this Court, and it appearing that the plaintiff has prepared, served and lodged with the clerk of this Court its proposed amendments to said proposed bill of exceptions, pursuant to the provisions of the statute and the rules of this Court, good cause appearing herefor,—

IT IS ORDERED that the time for the settlement, engrossment, and filing of said bill of exceptions in the above-entitled action be, and the same is hereby extended beyond the term of this court

within which cause was tried and the same may be thereafter settled, engrossed, and filed, during the July term of the court.

VAN FLEET,
Judge.

July 14, 1921.

Service of a copy of the within and attached order extending time beyond term of Court for settlement of bill of exceptions, on this day received is hereby admitted.

July 15, 1921.

CHICKERING & GREGORY,
Attorneys for Plaintiff.

[Endorsed]: Filed July 15, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

In the Southern Division of the United States
District Court, in and for the Northern District
of California, Second Division.

No. 16,243.

Before Hon. WM. C. VAN FLEET, Judge.

HUMBOLDT COUNTY TUNGSTEN MINES and
MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant.

TUESDAY, MAY 10, 1921.

Engrossed Bill of Exceptions to be Used on Defendant's Writ of Error to the United States Circuit Court of Appeals.

BE IT REMEMBERED that the above-entitled action came on duly and regularly for hearing before the above-entitled court on Tuesday, May 10, 1921, Hon. William C. Van Fleet, Judge, sitting without a jury, a jury trial of said action having been duly waived in the writing signed by the parties and filed in the action as required by law.

That this bill of exceptions is presented and is settled as a bill of exceptions in said action.

On the trial of said action Messrs. Chickering & Gregory represented by Donald Y. Lamont, Esq., appeared as attorneys for the plaintiff, and John F. Davis and W. S. Andrews, Esq., as attorneys for the defendant, and thereupon the following proceedings were had: [32]

Testimony of E. C. Voorheis, for Plaintiff.

E. C. VOORHEIS, a witness, called and sworn on behalf of plaintiff, testified as follows:

I reside in San Francisco, and I am the president of the Atolia Mining Company, the defendant in this action, and have been such president since 1916, and held such office during the years 1918 and 1919.

Mr. LAMONT.—I served a subpoena duces tecum on Mr. Voorhies to produce certain documents. First of all, Judge Davis, I want the telegram of November 21.

(Testimony of E. C. Voorheis.)

Mr. DAVIS.—Yes. (Handing telegram to Mr. Lamont.)

Mr. LAMONT.—Q. Mr. Voorheis, I show you here a telegram and ask you whether on or about the date it bears, namely, November 21, 1918, you received that from W. H. Shewan.

A. I received a telegram something like that.

Mr. LAMONT.—I offer this telegram in evidence, and ask that it be marked as our exhibit. It is as follows:

Plaintiff's Exhibit No. 1.

“Lovelock Nevada Nov 21 1918

E. C. Voorheis,

1404 Humboldt Bank Bldg.

San Francisco, Cal.

Can buy twelve tons sixty per cent and better for twenty-one fifty per unit f o b Toulon ninety per cent on bill of lading. Answer.

W. H. SHEWAN.”

(The telegram was marked “Plaintiff's Exhibit 1.”) [33]

Mr. LAMONT.—Q. I show you here, Mr. Voorheis, a copy of telegram which purports to have been signed by you and sent on or about November 22, 1918, and I ask you whether you sent such a telegram to Mr. Shewan?

A. Yes.

Mr. LAMONT.—I offer this copy in evidence and ask that it be marked “Plaintiff's Exhibit 2.” It reads as follows:

(Testimony of E. C. Voorheis.)

Plaintiff's Exhibit No. 2.

“San Francisco, Cal., Nov. 22, 1918.

OFFICE COPY.

W. H. Shewan,
Lovelock, Nevada.

Telegram received. Does this twelve tons include Beck's Lot from Sodaville? He was here yesterday and am to let him know today whether we will take it or not but you can take the twelve tons if they guarantee it to go sixty per cent or better. Must be free from impurities. Would prefer to to have sample analyzed first. If you can get sample ship immediately by Express to Atolia. They can wire us result.

“E. C. VOORHEIS.”

(“Charge to Atolia Mining Co.”)

The telegram was marked “Plaintiff's Exhibit 2.”

Now, Judge Davis, I would like a copy of the letter of February 5, 1919.

(Counsel hands Mr. Lamont copy of letter.) [34]

Mr. LAMONT.—Q. I show you here a letter dated February 5, 1919, and purporting to have been signed by you, and I ask you whether that letter was signed and sent by you to Mr. Shewan.

A. Yes.

Mr. LAMONT.—I offer this letter in evidence, and ask that it be marked “Plaintiff's Exhibit 3.” It is on the letter-head of the Atolia Mining Company; dated San Francisco, Cal., U. S. A., February

(Testimony of E. C. Voorheis.)

5, 1919, and addressed to Mr. W. H. Shewan, Toy, via Lovelock, Nevada,

Plaintiff's Exhibit No. 3.

“My dear Shewan:

We enclose you final invoice for 104 sacks concentrates which we suppose you got from the Humboldt County Tungsten Mining & Milling Company. The Final Certificate of Weight and Analysis included in the Certificate we sent you on the Joe Bean Lot which you can show to the people from whom you got this ore.

We are enclosing check for \$7,733.25 so that you can settle with these people and square up this Lot.

We can now get your final account made up and will send it to you.

It is hard at this time to make any predictions as to what the future market is going to be. As soon as we get any advice on that score will be glad to let you know. We would like to have you stay at the property any way for a little while until we can determine what is best to do. I am in hopes the market will pick up so that you can start to work again, which I think it will do, but it may not open up before April.

With kind regards, I am,

Yours truly,

E. C. VOORHEIS.”

(The letter is marked “Plaintiff's Exhibit #3.”)

The COURT.—Let me see that letter; as you read it, there [35] were a few words I didn't understand.

(Testimony of E. C. Voorheis.)

Mr. LAMONT.—There is one word left out, right near the beginning of it, the word “is”; with that word inserted, it would probably make it clearer.

Q. Mr. Voorheis, I show you a check, and ask you whether this check was enclosed in the letter to which we have last referred. A. It was.

Mr. LAMONT.—I offer this check in evidence and ask that it be marked “Plaintiff’s Exhibit 4.” It is as follows:

Plaintiff’s Exhibit No. 4.

“San Francisco, Feb. 5, 1919. 191—. No. 10,631.
THE FIRST NATIONAL BANK OF SAN
FRANCISCO. 11-8

Pay to W. H. Shewan, or order, \$7733.25—
SEVENTY-SEVEN HUNDRED THIRTY-
THREE DOLLARS TWENTY-FIVE CENTS.

ATOLIA MINING CO., INC.

By F. W. BRADLEY,
President.

By WALTERS.

By ALEX GRANGER,
Asst. Secretary.”

(The check bears the rubber stamp on the face “R. I,” and is endorsed as follows: “Pay to the order of FIRST NATIONAL BANK of San Francisco. ATOLIA MINING CO.”)

(The check was marked “Plaintiff’s Exhibit 4.”)

Q. Mr. Voorheis, I show you here a telegram bearing date February 17, 1919, to W. H. Shewan—
The COURT.—I suppose, if you ask them, the

(Testimony of E. C. Voorheis.)

parties from whose possession you get these will admit them.

Mr. ANDREWS.—Yes, your Honor.

Mr. LAMONT.—I offer this for the limited purpose of showing agency. There is something in it by way of affirmative defense.

Mr. ANDREWS.—I suppose, if it is admitted at all, it is admitted for all purposes.

Mr. LAMONT.—There is a matter there that bears on your [36] affirmative defense; I do not want to be bound by it.

The COURT.—I will let it go in.

Mr. LAMONT.—It reads as follows:

Plaintiff's Exhibit No. 5.

“Mt San Francisco Calif 1010AM Feb 17 1919

W. H. Shewan

Lovelock, Nev.

Hold up payment Humboldt County Tungsten Telegraphic advices from east ore not acceptable on account of high phosphor contents Do not give them check Writing.

E. C. VOORHEIS.”

(The telegram was marked “Plaintiff's Exhibit 5.”)

Cross-examination.

The WITNESS.—I was connected with the Atolia Mining Company as president in the year 1917 and I know W. H. Shewan.

Mr. ANDREWS.—Q. What connection, if any, did he have with the Atolia Mining Company?

(Testimony of E. C. Voorheis.)

The WITNESS.—(Continuing.) He was lessee of the St. Anthony Mines. It is located in Humboldt County, Nevada.

Q. Was the Atolia Mining Company the owner of the St. Anthony mine? A. It was.

Q. I show you here what purports to be a copy of a lease between the Atolia Mining Company and W. H. Shewan, and ask you if you have seen that document before? A. Yes.

Q. Is that a true copy of the lease entered into between W. H. Shewan and the Atolia Mining Company? A. It is.

Q. Is this the lease that you referred to a moment ago when you stated that a lease existed between the Atolia Mining Company and W. H. Shewan?

A. Yes.

Mr. ANDREWS.—I offer this lease as Defendant's Exhibit 1.

Mr. LAMONT.—We object to that as not being a proper subject [37] matter of cross-examination of this witness, dealing with new matter, and, if anything, it is a part of the defendant's case.

The COURT.—It is quite outside the scope of proper cross-examination. Objection sustained. That distinctly introduces a separate feature of your defense, that this purchaser was not your agent.

Mr. ANDREWS.—I realize that, your Honor, but at the same time it did seem to me that in view of the fact that the witness has testified that he was a

(Testimony of E. C. Voorheis.)

lessee, it was only going a step further to show what the lease was.

The COURT.—One is a distinct fact from the other. The fact that he was an agent is an entirely different thing.

To which ruling the defendant then and there excepted.

DEFENDANT'S EXCEPTION No. 1.

The defendant asked that the lease offered in evidence be marked for identification, which was done, and the following is a copy thereof:

Defendant's Exhibit No. 1.

“MINING LEASE.

THIS AGREEMENT OF LEASE, made and entered into this fifteenth day of November, A. D. 1917, by and between Atolia Mining Company, a California Corporation, doing business in the state of Nevada, party of the first part, lessor, and W. H. Shewan, of the City and County of San Francisco, State of California, party of the second part, lessee;

WITNESSETH: That the said lessor for and in consideration of the rents, royalties, covenants and agreements herein reserved, and by the lessee to be paid, kept and performed, has leased, let and demised unto the said lessee for the purpose of mining and for no other purpose, the following described mining property, situate, lying and being in the — [38] Mining District, in the County of Churchill, State of Nevada, to wit:

Within vertical planes drawn downward through

exterior boundary lines, saving and excepting all extralateral and other rights, privileges and appurtenances appertaining or belonging to adjoining and adjacent claims and properties, all and singular that certain piece or parcel of land known, designated and described as follows, to wit:

The St. Anthony group of tungsten mines.

TO HAVE AND TO HOLD unto the said lessee said demised premises, for the purpose of mining and for no other purpose whatever for the term beginning on the 15th day of November, A. D. 1917, and ending on the 15th day of November, A. D. 1919, at noon, unless sooner forfeited or determined through the violation of any agreement, or covenant, hereinafter contained, reserved or provided, to be kept and performed by said lessee.

IN CONSIDERATION WHEREOF, the said lessee does hereby covenant and agree as follows, to wit:

1. To enter upon said premises and work the same in proper, skillful and minerlike fashion, and in manner necessary to good and economical mining, so as to take out the greatest amount of ore possible with due regard to safety, preservation and development of said premises as a workable mine and to the special covenants hereinafter reserved.

2. To work and mine said premises with at least — shifts of eight hours each, during each and every month of the continuance of this lease, unless prevented by labor strikes, scarcity of labor or extraordinary mining casualty, and to pay all miners and other laborers employed in and about

said premises and mining operations the customary wages of the district. [39]

Any caving of stopes or obstruction of drifts, levels or any other workings necessary to the continuous operation of said premises or any part thereof resulting from the default or negligence of said lessee by reason of insufficient or improper timbering, shall work an immediate forfeiture of this lease.

3. To well and sufficiently timber with strong, well-fitted and durable timbers all the workings on the premises hereby leased at all points where proper, in accordance with good mining and to properly repair or replace all timberings which may be rendered insufficient by shock of blasting, pressure, water, wear and tear or other cause, and to keep the timber of said workings at all times in good, safe and serviceable condition and to remove no timbering from any portion of said premises, except in so far as may be necessary for repairs, enlargement of workings or rearrangement for the more speedy and economical working of the property.

4. To keep at all times the drifts, shafts, tunnels and other workings accessible and clear of loose rock and rubbish.

5. To make all shafts at least seven feet long by at least four feet wide in the clear and all drifts at least six feet high and four feet wide in the clear.

6. That no levels shall be less than fifty feet apart and that no underhand stoping shall be done on the premises.

7. To occupy and hold as the agent and representative of the lessor, any and all cross or parallel lodes, spurs, veins or mineral deposits of any kind and nature, whatsoever, which may be discovered by said lessee or any person or persons under him in any manner, while working within, upon or from said demised premises, as the property of the lessor, with the [40] privilege to the lessee of working the same as part and parcel of said demised premises subject to all the terms and reservations in this lease contained.

8. To permit the agent or agents of the lessor, its officers and authorized representatives to any time to have access to any and all workings upon said premises, for the purpose of sampling and testing the values of any and all ores that may be disclosed in any part of said workings, or upon said premises, or which may be lying on the dumps and for the purpose of inspection and surveying.

9. That he will promptly pay for all labor, material and supplies used and employed by him in connection with such mining operations and that he will deliver to the lessor on the 15th day of each and every month during the continuance of this lease and that on the last day of the term herein provided, a full, true, and correct statement in writing, showing all bills and accounts for labor, material and supplies, used and employed in such mining operations, and that all such bills and accounts have been fully paid, satisfied and discharged, or the amounts due and owing for such labor, materials and supplies, and if any liens be filed, or if

any such indebtedness exists, whether shown on such report or not, the lessor may at its election declare a forfeiture of this lease, as herein provided.

10. That he will not assign or transfer this lease, or any interest, claim or demand thereunder, and that he will not sublet said premises, or any part or parcel thereof, to any other person or persons, without the written consent of the lessor, first had and obtained thereto, and that he will not allow any person or persons, not in privity with the parties hereto to take or hold possession of said premises or any part or parcel thereof, [41] either above or below the surface of the ground, under any pretense whatsoever.

11. That said lessee does further agree to suspend mining operations at any time the said lessor may deem such suspension of said mining operations necessary or expedient from any cause, it being mutually understood and agreed that the said lessee shall be entitled to an extension of this lease for a period equivalent to the duration of any such suspension of said mining operations.

12. It is further mutually agreed and understood by and between the said parties, that in the event the said lessee, his employees, agent or representatives shall at any time during the continuance of this lease make a strike of ore of any importance on said premises, or a strike of increased values in ores theretofore discovered, the same shall be reported by said lessee to said lessor, in writing within twenty-four hours after such strike.

13. Not to mix or adulterate any ores broken

or mined and to classify all ore as directed by the lessor. All ores mined which are of too low grade for present shipment, and which may be extracted from the mine and not disposed of immediately, but thrown on the dump, shall remain the property of and subject to the control and disposition of said lessor. Said lessee shall be chargeable with and pay any loss or expense resulting from any shipment of ore which may prove to be not of payable or salable grade.

14. To notify the lessor, its manager or duly authorized agent wherever ore is ready for shipment, giving the estimated tonnage and value thereof, and it is expressly understood and agreed that all ore extracted from said leased premises shall [42] be shipped in the name of the lessor and shall be treated by and at the mill of the said lessor.

15. It is further agreed and understood that royalties are reserved by the lessor upon all ore extracted and shipped or sold from said demised premises by virtue of this agreement, to be deducted, retained and paid as hereinafter provided.

Said lessee shall be chargeable with any and all loss and expense resulting from any shipment of ore which may prove to be not of a payable grade.

16. All shipping ore shall be shipped with reasonable diligence and all reduction returns shall be made to said Atolia Mining Company, at 1404 Humboldt Bank Bldg., S. F., Cal., and distributed as herein **provided**.

17. That he will not suffer nor permit the removal from said premises, of any ore or mineral

bearing rock, quartz or earth, of any kind or character, by any person or persons whomsoever, except for the purpose of shipment, treatment and sale by said lessee as hereinbefore provided, it being specifically covenanted, agreed and understood by and between all of the parties hereto that any default, failure or neglect on the part of said lessee to comply with the terms and conditions of this clause specifically stated, strictly and literally, shall work an immediate forfeiture of this lease, and the said lessor shall be immediately released from all obligation, either in law or in equity, thereunder, and the said lessee shall forfeit all and every right, claim and demand whatsoever therein, thereto and thereunder.

18. There is expressly reserved to the lessor and at the option of the lessor, to any of the lessees or prospective lessees of the lessor a right of way through the premises hereby [43] leased for more convenient working or examination of adjacent ground; and there is also expressly reserved to the lessor the right and privilege to do any and all development work on the premises hereby leased, which may be rendered desirable by reason of any litigation or controversy which may arise and which may effect said leased premises or other adjacent property in which the lessor is interested and to use the workings of the lease herein, in prosecuting such development work, and that all ore mined in the prosecution of such development work shall belong to the lessee herein (in so far as the same shall

be taken from the ground hereby leased) subject to the royalty hereinbefore reserved.

19. Lessee agrees to pay his *pro rata* portion of all taxes assessed upon said premises based upon the output therefrom in accordance with the laws of the State of Nevada, during the life of this lease; that is to say: to pay that portion of the taxes assessed upon said premises which the proportion of the proceeds of the ore extracted therefrom retained by the lessee bears to the total of any such tax or assessment, and for the purpose of rendering the above covenant in reference to taxes effectual, it is further covenanted and agreed that the said Atolia Mining Company shall retain two and one-half ($2\frac{1}{2}$) per cent of the proceeds of any and all shipments of ore, the said sum to be held by said Company to provide a fund for the payment of said taxes, providing that any portion of funds so retained, remaining after payment of said *pro rata* share of said taxes, shall be paid over to said lessee, at the expiration of this lease.

20. It is expressly covenanted and agreed between the parties hereto, that should any legal proceedings be instituted [44] against parties hereto or either of them which would interfere with the possession and enjoyment of said demised premises, that the lessee shall, under no circumstances, attempt to hold the lessor liable in damages or otherwise to the lessee therefor, on account of such disturbed and interrupted possession and enjoyment.

21. It is expressly understood and agreed that the said lessor reserves the property and right of

property in and to all ores extracted from said premises during the term of this lease.

22. That he will deliver to said lessor on the first day of each and every month, a full, true, and correct statement in writing, showing the names of all persons employed by them upon and about said premises during the preceding month, together with number of shifts worked, the rate per shift and the amount paid each, and that he will promptly discharge any person or persons upon notification from the lessor that the employment of such person or persons is not satisfactory to said lessor, PROVIDED, that at no time shall said lessor demand the discharge of such a number of men as shall seriously interrupt the operations of this lease.

23. Said lessee does hereby furthermore covenant and agree that in case he fail to commence work on said premises as aforesaid, or to work and mine the same continuously, with diligence and in a workmanlike manner, or to keep the same securely timbered, drained, clear and in safe condition, or to allow inspection, sampling or survey thereof, or to furnish true information regarding the same when requested by or for the lessor, or to keep the same from liens or to make monthly settlement for work, services and materials, or to duly notify the lessor when ore is ready for shipment, or to pay [45] loss in shipping undergrade ore as above provided, or shall do any underhand stoping, or assign or sublet any interest in this lease or said premises without the written consent of the lessor, or shall record or allow to be recorded, this lease or any sub-lease

or assignment thereof, or shall in these or any other respects fail to keep and fulfill any and all conditions, covenants or agreements, herein expressed or implied, then and in that case, the term of this lease shall at the option of the lessor expire and it shall be lawful for the lessor, its manager, attorney or other duly authorized agent to declare this lease void and of no effect thereafter and with or without process of law and with or without notice to the lessee to enter upon and take possession of said premises and dispossess all persons occupying the same; and in such case and also at the expiration of this lease by limitation, to wit, at noon of the last day of the term hereby granted as aforesaid, said lessee hereby *agree* to surrender, yield and deliver to the lessor, its successors or assigns, quiet and peaceable possession and enjoyment of said premises, and dump, ore or other mineral detached or broken down from said premises, but still remaining thereon, together with the appurtenances (hoists only excepted, and not gallows frames), including all improvements below the collar of the shaft, in good order and condition, with all drifts, shafts, tunnels, winzes, and other workings and passages clear of loose rock and rubbish and drained and ready for immediate and continuous working, accidents not arising from any negligence alone excepted, without demand or further notice on the 15th day of November, A. D., 1919, at 12 o'clock noon of said day or at any time previous thereto upon demand for forfeiture. [46]

25. Time and Punctuality are of the essence of this agreement.

26. All the operations of the lessee under this

lease shall be so conducted as to fully comply in all respects with the laws of the State of Nevada.

27. As a rental under this lease the lessee agrees to pay rent to the lessor therefor in the following manner: He shall turn over to the lessor all the tungsten concentrates recovered by him from the operation of said property, to be sold by the lessor to the best advantage according to the market conditions at the time received, and from the net returns of such sales after payment of transportation, sampling and assaying charges, the lessor is to retain, in addition to anything hereinbefore provided, royalties based on a sliding scale, as follows: first three months 25 per cent; the next following three months 30 per cent; the next following three months 40 per cent, and to pay over the remainder of the amount obtained from said sales to the lessee, or his order, settlements of amounts of royalties and moneys to be paid over to be upon and out of the receipts of proceeds of said sales.

28. The lessor shall have the right to post upon said property and every part thereof all notices by it deemed necessary to protect it and said property and every part thereof from any liability arising from liens.

This agreement and each and every clause and covenant thereof shall be binding upon and enforceable by the respective successors, heirs, executors, administrators and assigns of the parties hereto.
[47]

IN WITNESS WHEREOF the said lessor has duly caused this instrument to be executed and the

said lessee has hereunto set his hand and seal the day and year first above written.

(Signed) ATOLIA MINING COMPANY.

By E. C. VOORHEIS,

Its President.

And by E. A. STENT,

Its Secretary.

Witness to all signatures:

JOHN F. DAVIS.

(Signed) W. H. SHEWAN.

* * * * *

(Attached:)

State of California,

City and County of San Francisco.—ss.

On this 23d day of November, in the year of one thousand nine hundred and seventeen, before me, J. D. Brown, a notary public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared W. H. Shewan, known to me to be the person described in and who executed the annexed instrument and he acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year last above written.

[Notarial Seal affixed here]

(Signed) J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California.

Room 206 Humboldt Bank Building.

Phone Douglas 2324.

My commission expires April 4, 1918. [48]
(Attached:)

State of California,
City and County of San Francisco,—ss.

On this 23d day of November, in the year of one thousand nine hundred and seventeen, before me, J. D. Brown, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared E. C. Voorheis and E. A. Stent, known to me to be the president and secretary respectively of Atolia Mining Company, the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year last above written.

[Notarial Seal affixed here]

(Signed) J. D. BROWN,
Notary Public in and for the City and County of
San Francisco, State of California.

Room 206 Humboldt Bank Building.

My commission expires April 4, 1918.

(#16243. U. S. Dist. Court. Offered by Deft.,
not Admitted 5/10/21. Maling, Clerk.)”

Testimony of L. A. Savage, for Plaintiff.

L. A. SAVAGE, a witness called and sworn on behalf of plaintiff, testified as follows:

I reside at Toulon, Nevada, and was connected with the Humboldt County Tungsten Mines and Mills Company in 1918 and 1919. In November, 1918, I had dealings with W. H. Shewan, in connection with the purchase and sale of some scheelite concentrates. [49]

Mr. LAMONT.—Q. Who did Mr. Shewan at that time say he was representing?

Mr. ANDREWS.—I object to the question on the ground that the alleged statements of one claiming to be an agent do not bind the principal, and that any admissions or statements made for the purpose of binding a third party are not binding upon him.

The COURT.—The objection is overruled.

A. The Atolia Mining Company. I entered into a contract with regard to the sale of certain scheelite concentrates at that time. They were a specific lot of concentrates already refined and on the floor of the mill. There were two lots of concentrates designated as Lot L-1 and as Lot L-2. Lot L-1 contained 72 sacks. I do not recall the net weight of those sacks to the exact pound. Lot L-2 contained 32 sacks and there were 104 in all.

The signature to the memorandum that is shown me is that of Mr. W. H. Shewan, who signed it on November 29th, the same day that the car was loaded with concentrates, if that is the right date,

(Testimony of L. A. Savage.)

and I think it is. It is the receipt for the concentrates. [50]

Mr. LAMONT.—I offer this document in evidence, and ask that it be marked our exhibit next in order. It reads as follows:

Plaintiff's Exhibit No. 6.

“Lovelock, Nev., Nov. 29th, 1918.

Received from the Humboldt County Tungsten Mines and Mills Company, eleven thousand eight hundred ninety-three pounds scheelite concentrates as follows:

Lot 1—72 sacks.....8723 Lbs. Net

Lot 2—32 sacks.....3170 Lbs. Net

—
104

—————
11893 Lbs. Net

Same being purchased by Atolia Mining Company, @ \$21.00 per unit of WO₃, ninety per cent (90%) to be paid upon check assay of control sample, by Atolia Mining Co., final payment of ten per cent to be paid upon final checking and assaying of entire lot.

W. H. SHEWAN.

Witness:

FRANK B. EVANS.

(The document was marked “Plaintiff's Exhibit 6.”)

Mr. ANDREWS.—I object to the introduction of that document in evidence on the ground that it is immaterial, irrelevant and incompetent, and on the ground that the statements in there signed by

(Testimony of L. A. Savage.)

W. H. Shewan tending to show that the Atolia Mining Company had purchased this tungsten ore mentioned therein is not binding upon the company, because the statements of a third person as to his power to represent a third party do not bind him without proof of the fact that he was the agent.

The COURT.—I think there is sufficient basis here to admit it at this time.

Mr. ANDREWS.—We take an exception.

DEFENDANT'S EXCEPTION No. 3.

The WITNESS.—(Continuing.) The expression \$21 per unit of WO_3 as set forth in the receipt and memorandum of agreement means that "per unit" is the standard of measurement 1 per cent of the [51] WO_3 contents. That means, as I have been informed, tungsten oxide or tungstic acid, and it is the per cent that is contained in the crude ore or the scheelite that the concentrate value is based upon. There are 20 pounds in a unit, or 1 per cent of 2,000 pounds. Mr. Shewan read that memorandum before it was signed. Mr. Shewan asked for a copy and I gave him one.

Mr. LAMONT.—Q. Mr. Savage, do you remember a conversation which occurred on or about February 17, 1919, I believe, at 1404 Humboldt Bank Building, when a Mr. Beck was present part of the time, and Mr. C. B. Nicholls was present all the time, and you and Mr. Voorheis were present all the time?

Mr. ANDREWS.—I object to that; it seems to me that is immaterial, irrelevant and incompetent.

(Testimony of L. A. Savage.)

The COURT.—It may be, but we cannot tell yet. Answer the question.

A. I do.

Mr. LAMONT.—Q. Were these specific concentrates furnishing the subject matter of this case discussed at that time? A. They were.

Q. How did you refer to Mr. Shewan during that conversation?

A. As your Mr. Shewan, or your agent.

Q. Did Mr. Voorheis take any exception to that?

A. He did not. [52]

The WITNESS.—(Continuing.) I received the letter which you show me dated March 11, 1919, and purporting to be signed by E. C. Voorheis.

Mr. LAMONT.—At this time I offer this letter in evidence for the following limited purposes: To show admission or ratification of agency; to show that there was an assay made apparently in accordance with the contract, and for the admission that the assay showed that the ore ran 61.87 per cent of tungsten acid, and that its net weight was 11,904 pounds; in other words, I do not want to anticipate their defense, or be bound by their statement as to the contents.

Mr. ANDREWS.—I suppose the letter should be introduced for all purposes; it is the same question that was before the Court before.

The COURT.—Yes, I think so; let it go in.

Mr. LAMONT.—It reads as follows: [53]

Plaintiff's Exhibit No. 7.

“San Francisco, Cal., U. S. A., March 11, 1919.
Humboldt County Tungsten Mines and Mills Co.,
Lovelock, Nevada.

Gentlemen:

We are just in receipt of your telegram as follows:

‘Would you advise when we may expect settlement on shipment of eleven thousand eight hundred ninety-three pounds concentrates sold through your company November twenty-ninth We feel reduction company has had ample time to make settlement Also wish to advise weight and assays on this lot as given us by your agent Mr. Shewan Does not check being nine hundred forty-one pounds short on actual net weights and four point eight three low on WO_3 contents.’

And in reply will state that the car in which your ore was shipped has arrived at its destination and the weight is as follows:

Special Lot #8:

104 Sacks, Gross Weight	12,035 lbs.
Tare “	124 “
Net “	“

11,911 “

Moisture .066%

7 “

Net Dry Wt.

11,904 “

(Testimony of L. A. Savage.)

The Analysis was as follows:

WO₃ — 61.87%

Phos. — .146%

Sulph.— .397%

I am exceedingly sorry that we allowed you to put this Lot into that car on account of the high phosphor content as it has been rejected on account of not coming up to specifications, consequently we will have to reject your ore, which will now be subject to your order and you will be indebted to us for the freight from shipping point to Niagara Falls.

The whole trouble with this shipment was 32 sacks, which Mr. Savage said was put into this Lot and which ran high in phosphorus [54] and copper and should never have been put in. If it had not been put in your shipment would have been all right. It was the same with the Lot we got from Beck & Bean, they had 18 sacks from De Armond which spoiled his lot, as when they were sampled they were mixed together and it just played the devil. We have not been able to make settlement yet and I do not know just how we are coming out on it. I explained this matter to Mr. Savage when he was here and supposed he would let you know about it.

Yours truly,

E. C. VOORHEIS."

(The letter was marked "Plaintiff's Exhibit 7.")

The WITNESS.—(Continuing.) The first intimation that I received that the Atolia Mining Company was going to deny the agency of Mr. Shewan

(Testimony of L. A. Savage.)

was in March, I think it was, in a letter I received from Mr. Voorheis and I think that was the letter you were just asking me to read. No, I was mistaken, it was the letter of March 20, 1919, and it was about March 20, 1919.

The goods were delivered on November 29, 1918, at Toulon and the delivery was made in my mill. Mr. Shewan took possession of them at that time and the weights were checked at that time. The weights as shown in the memorandum were taken right off the scale weights. As we went through, Mr. Shewan checked, and also myself or one of the men I had working with me checked. The weights as shown in the memorandum were taken from the scale weights. I retained a control-sample of Lot 1 and took it to the office and put it where we kept control-samples and left it there.

The COURT.—Q. What do you mean by a control-sample?

A. When a lot is prepared for shipment, we take a sample and split it down until we get it down to the right size for assay, [55] and one is held in reserve and the other is given or sent for analysis to determine the valuation and percentage of WO_3 content in the samples. The other one would be held for reference for a period of time, sometimes for a year.

Q. I am acquainted with the method of taking samples, but I never heard the word "control-sample"; how does that distinguish it from any other sample?

(Testimony of L. A. Savage.)

A. That was the final sample that controlled the value of the concentrates.

Q. Then you mean an average sample?

A. An average sample, yes; we term it "control-sample."

The WITNESS.—(Resuming.) After the controversy commenced, I gave my sample to Mr. Abbott Hanks for determination, for check. He is a chemist and assayer of San Francisco.

I did not have any control-sample of Lot 2 because Lot 2 was sampled at the time it was shipped and Mr. Shewan got the control-sample. The reserve sample was mislaid or destroyed, or something, at the mill; but Mr. Shewan got the control-sample. Whether he took both of them, or not, I do not know. I had none of them left.

I gave Shewan samples of Lot 1. Mr. Shewan stated subsequently that the Atolia Mining Company had made an assay, so far as tungsten content is concerned, as to these two lots.

Mr. LAMONT.—There is no question but what we demanded payment from you, is there? Is there any point made on that?

Mr. ANDREWS.—No point on that.

The WITNESS.—(Resuming.) We have never received any payment for any of these concentrates. The reasonable value of Lot 1 in November, 1918, was about \$25 per unit.

Cross-examination.

The WITNESS.—I had a conversation with Mr. [56] Shewan relative to the purchase by him of

(Testimony of L. A. Savage.)

the tungsten concentrates involved in this action. I first had that conversation prior to November 29th. I cannot just recall what day it was but it was several days before the shipment was prepared. I would not say it was prior to November 21st. It might be a few days one way or the other, but it was several days before the shipment was prepared. The conversation took place at my house, at Toulon.

I never had any conversation with Mr. Shewan relative to tungsten concentrates at the St. Anthony mine. I never had any conversation with Mr. Shewan with reference to his purchasing any portion of the 12 tons involved in this action at the St. Anthony mine.

The only conversation that I ever had with Mr. Shewan relative to this shipment was one time, a month or two afterwards, I called at the mill. That was the only time I ever had a conversation with Mr. Shewan at the St. Anthony mill or mine.

Several days before November 29th I had a conversation with Mr. Shewan relative to the purchase of this ore. It occurred at my house at Toulon. I was in bed laid up at that time. I don't recall any telephonic conversation with Mr. Shewan relative to the purchase by him of this ore. I had two conversations with him relative to the purchase of it but I do not recall any telephoning.

The first conversation, as I stated, was somewhere possibly a week, or four days, or three, or five, or six days, or something like that before the shipment was prepared; he came to the mill and then came to

(Testimony of L. A. Savage.)

the house and asked for me. I was in bed that day. He came into my bedroom. He wanted to know if we had any concentrates that he could get to include in this carload, as he was making up a carload and would like to ship the full car. At that time I told him what we had. Our conversation was [57] mostly on price, he offering me \$23.50 per unit. I told him I could not give him a definite answer on it, but I thought it would be acceptable, but that I would have to wire Chicago. "Well," he says, "I can't say definitely, either, I will have to wire my people." I wired the Chicago office and got an answer to accept. He came back the next day, or the day after that, and stated that he had received word from his people, the Atolia Mining Company, and all he was authorized to offer was \$21 a unit, and I accepted it. Then the car was *set* in a day or two after that and Mr. Shewan came up and we loaded the concentrates.

Q. Mr. Savage, do you remember calling upon Mr. Shewan on or about the 20th day of November, at the St. Anthony mines, in your car, for the purpose of selling to him six tons of tungsten concentrates, and offering to sell him six tons at that time?

Mr. LAMONT.—I object to the question as immaterial, irrelevant and incompetent, and not proper cross-examination.

Mr. ANDREWS.—He just stated he had no conversation with Mr. Shewan except at Toulon; I am now directing his attention to a conversation which

(Testimony of L. A. Savage.)

we believe took place at the St. Anthony mine. It is very important.

The COURT.—But it is not in cross-examination, because nothing was asked him about it on direct. You are opening up a subject yourself and then claiming you have the right to follow it up. If it is not in cross-examination of what he testified to on direct, it does not widen your right.

Mr. ANDREWS.—I realize that, your Honor, but he said he entered into a contract with him at Toulon.

The COURT.—Yes, and he produces the writing. You are familiar with the rule, of course, that that concludes all [58] previous negotiations.

Mr. ANDREWS.—If it were merely a contract between the parties, your Honor, yes, but this is not a contract between the parties to this action.

The COURT.—When you come to make out your case, you can show that the alleged agent was not your agent at all. That is your right.

Mr. ANDREWS.—But the question is, your Honor, whether or not he had—

The COURT.—I will sustain the objection.

Mr. ANDREWS.—I note an exception.

DEFENDANT'S EXCEPTION No. 5.

The COURT.—This does not at all preclude you from going into any proper subject at the proper time; I am not going to violate the rules of evidence to permit you to put in your case under the guise of cross-examination.

Mr. ANDREWS.—I realize that, your Honor.

(Testimony of L. A. Savage.)

I appreciate your Honor's attitude. I think it is a close question.

The COURT.—I don't. I think it is a broad one.

The WITNESS.—(Continuing.) Mr. Shewan did not state at the time of the signing of the receipt which has been introduced in evidence here that he had no authority to sign any document binding the Atolia Mining Company. He did not ask me to explain to him what I meant by stating in the document that the goods were sold to the Atolia Mining Company. I do not recall that any other document was signed by Mr. Shewan at the time of the signing of the receipt which has been introduced in evidence and I do not believe there was. As far as my recollection goes, I gave him this one document, the receipt, to sign and he signed it and the only document that was signed by Mr. Shewan on November 29th [59] was "Plaintiff's Exhibit 6."

Testimony of Prentiss T. Bee, for Plaintiff.

PRENTISS T. BEE, a witness, called and sworn on behalf of plaintiff, testified as follows:

I live in Oakland; I am in business in San Francisco; I am and have been since October, 1912, chief chemist for Abbott A. Hanks, 624 Sacramento Street, San Francisco. Mr. Hank's business is chemistry and assaying. [60] We received on or about February 9, 1920, from the Humboldt County Tungsten Mines and Mills Company a control-sample of scheelite concentrates, marked "L-1."

(Testimony of Prentiss T. Bee.)

I analyzed that sample as to tungstic acid content and found the content to be 66.83 per cent WO_3 .

Cross-examination.

The WITNESS.—I received the sample for examination in February, 1920. I examined the sample for other things than tungsten; I examined it for phosphorus, copper, and sulphur. The sample that was given to me was marked "L-1." I don't recall receiving any sample marked "L-2."

Testimony of Frank B. Evans, for Plaintiff.

FRANK B. EVANS, a witness, called and sworn on behalf of plaintiff, testified as follows:

I reside in Winnemucca, Nevada, and was connected, during the years 1918 and 1919, with the Humboldt County Tungsten Mines and Mills Company, at Toulon. I signed as a witness "Plaintiff's Exhibit 6" in this case. Mr. Shewan read over that memorandum of agreement before signing it, and I signed it as a witness. It was at this time that the concentrates furnishing the subject matter of this suit were delivered and they were in the car. I was in and out of the mill at the time they were checking the weight. I did none of the checking. I did not see all the weights taken at that time, though I saw some of them. I saw the concentrates put in the car.

Testimony of J. C. Smith, for Plaintiff.

J. C. SMITH, a witness, called and sworn on behalf of plaintiff, testified as follows:

I reside at Lovelock, Nevada. In November,

(Testimony of J. C. Smith.)

1918, I was employed by Mr. Loring and Mr. Friedman, the Pacific Tungsten, and by the Nevada Humboldt County Tungsten. At that time I was in Toulon. I was at the mill of the plaintiff corporation at all times. I had to do with giving Mr. Shewan samples of the concentrates [61] involved in this action. I don't just remember the date when those samples were given; it was several days previous to the shipment. I just quartered the samples at the mill. By "quartering" I mean quartering a sample down to a sample size. We take samples of a lot, we would have perhaps fifty pounds, and we would quarter that down to perhaps a four-ounce size, to get an average sample. It is part of the preparation. I personally handed the samples to Mr. Shewan. This was several days prior to the shipment. I handed him separate samples of the two lots, lot 1 and lot 2. Other samples were given to Mr. Shewan later on, on the day of the shipment, by Mr. Savage. Those were samples of both lots involved in this case, lot 1 and lot 2, and were separate samples. Mr. Shewan came up with his men that morning and started loading the car which was partly loaded with other concentrates; and I checked weights part of the time with Mr. Shewan at the scales, and Mr. Shewan's men carried them off and put them in the car. There had been prior to this time tags on these two lots. They were sacked prior to this time and the tags on these two lots were "L-1" and "L-2."

Mr. ANDREWS.—I don't want to take up your

(Testimony of J. C. Smith.)

Honor's time unnecessarily; as far as the question involved about lots 1 and 2 having been put in this car and this tungsten having been turned over, there is no question about that; in other words, there is no question about the fact that 11,000 pounds [62] of tungsten were put in this car referred to, and that it went east. There is no use taking the time of the Court to prove that.

Mr. LAMONT.—And Mr. Shewan, himself, took delivery at our mill?

Mr. ANDREWS.—I don't know what he did, but I concede that they went in that car.

Cross-examination.

The WITNESS.—I stated something about having made two sets of samples. The first set was made several days before the shipment. I don't just recall the day because I didn't pay much attention to it. I made that sample at Mr. Shewan's request. I could not say it was around the 21st of November; perhaps it was six or seven or eight days later. Mr. Savage made the second set of samples himself in my presence and in the presence of Mr. Shewan. [63]

The COURT.—Q. He asks you if you saw those delivered to Mr. Shewan? A. Yes, sir.

The WITNESS.—(Continuing.) Mr. Savage gave him these samples on the day of the shipment. I did not send any one of those sets of samples to the Atolia Mining Company.

Mr. LAMONT.—That is our case in chief, if your Honor please.

(Testimony of W. H. Shewan.)

Mr. ANDREWS.—If your Honor please, I would like at this time to make a motion for a non-suit upon the ground that the telegrams introduced in evidence do not show any basis for contending that the defendant, Atolia Mining Company, was a principal, and that Shewan was its agent in the transaction involved herein.

The COURT.—It is really upon the ground of lack of evidence as to the agency of the purchaser, is it?

Mr. ANDREWS.—Yes, your Honor.

The COURT.—I regard it as quite sufficient for a *prima facie* case.

Mr. ANDREWS.—I note an exception.

DEFENDANT'S EXCEPTION No. 6.

Testimony of W. H. Shewan, for Defendant.

W. H. SHEWAN, a witness called and sworn on behalf of defendant, testified as follows:

I am engaged in the business of mine operating at the present time, up in Oregon, and I am not connected with the Atolia Mining Company at the present time. I was connected with the Atolia Mining Company in 1917 as lessee of the St. Anthony mine in Nevada; I had a lease on November 15, 1917. The St. Anthony mine is not the main property of the Atolia Mining Company; it is one of their side properties and is a small property; the main property is down in Randsburg, California, in San Bernardino County. [64]

(Testimony of W. H. Shewan.)

Mr. ANDREWS.—I will show you this agreement, Mr. Lamont.

Mr. LAMONT.—What is the material part of this agreement? I have not had time to read it over.

Mr. ANDREWS.—The pertinency of it is to show that the relationship between Mr. Shewan and the Atolia Mining Company is lessor and lessee.

The COURT.—That is absolutely immaterial; and the contents of the agreement is absolutely immaterial. A man may be a lessee of another or a lessor of another and still be his agent in a different transaction.

Mr. ANDREWS.—The only purpose of this is to show Mr. Shewan's relationship, outside of any special relationship which may have arisen out of these telegrams which were put in evidence, was not that of agent of the Atolia Mining Company.

The COURT.—You are not concerned in refuting his agency in any other transaction but this one. We are wholly uninterested in this transaction of the lease.

Mr. ANDREWS.—They introduced a check here sent by the Atolia Mining Company to Mr. Shewan. This lease provides for that matter in one of its paragraphs, and explains the circumstances under which those moneys were being sent to Mr. Shewan.

The COURT.—If you can show me anything that that lease has to do with this case, that is a different matter.

(Testimony of W. H. Shewan.)

Mr. ANDREWS.—It explains the circumstances under which—

The COURT.—Does it state that the money for the purchase of this ore was to be advanced?

Mr. ANDREWS.—No, your Honor. It does this: Here are two telegrams, from Shewan to the Atolia Mining Company and back again. Read without knowledge of the surrounding circumstances they would indicate that the Atolia Mining Company was offering to [65] buy this ore; in view of the surrounding circumstances it will appear that Mr. Shewan was buying the ore for his own account, that the Atolia Mining Company were permitting him to put the ore in this car; that the books of account will show that in all of these special transactions he bought for his own account.

The COURT.—You have an erroneous idea of the proper way of proving such things. If this were a controversy over the relations of the parties under this lease, the lease would be a perfectly proper medium through which to prove what the relations were; but in a transaction between third parties, you have a right to ask this witness what the fact was as to this agency, how he purchased these concentrates, and all that, but the lease has nothing at all to do with it.

Mr. ANDREWS.—Your Honor will remember the case in California, the Bergthold case, and I think your Honor may have been on the bench at the time that case was decided, where it was held that in cases of this sort it was permissible to go

(Testimony of W. H. Shewan.)

into all of the circumstances surrounding the entire transaction.

The COURT.—That is an entirely different thing. I remember that case very well. You have a right to go into circumstances where you are not precluded by your writing.

Mr. ANDREWS.—I don't mean that this lease is to be introduced for the purpose of binding the plaintiff. I merely want to show the relations of the parties.

The COURT.—You can ask this witness what his relationship was. He has already said he was a lessee of the St. Anthony mine. We are interested in that, of course, because that identifies what his relationship was to that extent. We are not interested in this lease at all. [66]

The WITNESS.—(Continuing.) The lease was entered into on November 15, 1917. After the lease was entered into I had a conversation with Mr. Voorheis with reference to my purchasing special lots of tungsten concentrates. The conversation took place in the Humboldt Bank Building, room 1404. No one was present but Senator Voorheis and myself. It was around Christmas time, the end of the year 1917. After we had talked over the management of the St. Anthony mine, and my proposition of running it, Senator Voorheis said that if at any time I could buy any small quantities of ore, of tungsten concentrates, as he explained to me, in order to get a carload, which reduced the shipment rates a great deal, he claimed that the

(Testimony of W. H. Shewan.)

freight on a ton lot would be around about \$90 for shipping East, and a carload would run, on an average, somewhere around about \$50, he says that any time I could buy any small lots that way that were absolutely pure, free from impurities, and running over 60 per cent WO_3 , that the company would advance me the money to pay for the same and give me anything that I made on the purchase.

The COURT.—Q. You say Mr. Voorheis authorized you to buy any small lots of concentrates for filling out carload lots?

A. Yes, your Honor.

The COURT.—Q. What were you to buy these concentrates for—for them to fill out carload lots for them?

A. With my own ore that I was putting in the car, I would not have enough for a carload, but he was shipping some for Mr. Loring, from Toulon, and in order to make a carload I could buy up these small lots. [67]

Mr. ANDREWS.—Q. Did Mr. Voorheis say anything about on whose account the ore was to be purchased, in those small special lots?

A. I was buying them on my own account.

Mr. LAMONT.—Just a moment; we object to that, and ask that it be stricken out.

The COURT.—Strike that out. Answer the question. Read the question to the witness.

(Question read by the reporter.)

A. He did.

Mr. ANDREWS.—Q. What did he say?

(Testimony of W. H. Shewan.)

A. He said they were to be purchased by me and the company would advance the money to pay for them.

The COURT.—Q. His company?

A. His company.

Mr. ANDREWS.—Q. Did he say anything about selling that ore?

A. I had a contract with him to sell all my ore, under the terms of my lease.

Mr. LAMONT.—We ask that that be stricken out as immaterial, irrelevant and incompetent, and referring to the contents of a written instrument.

Mr. ANDREWS.—That is the instrument that I wanted to put in evidence. I wanted to show that all of these transactions were all a part of the same idea, that the company was advancing money back and forth, he being without any capital.

The COURT.—Let that be stricken out. Answer the question now, Mr. Shewan. Just notice what the question is, and you will be able to answer it. Read the question.

(Question read by the reporter.)

A. He did.

Mr. ANDREWS.—Q. Please state what he said.

A. He stated that whatever I purchased that way I could sell through the company as my own; I could put it in the carload lot. [68]

Mr. LAMONT.—If your Honor please, I would like to urge some general objections at this time to these defenses.

The first objection is that counsel have pleaded

(Testimony of W. H. Shewan.)

four defenses, all of which are apparently affirmative defenses, based upon misrepresentation. They have been embodied in separate defenses, numbered 1, 2, 3, and 4, and are, in effect—at least the defenses are, in their nature, defenses in confession and avoidance. There is no concession whatsoever made of the existence of this contract. In order to direct the Court's attention more specifically to the situation, I want to refer to some of the language in the answer. I call your Honor's attention—

Mr. ANDREWS.—I think you have the wrong conception of this. I am simply trying to get from Mr. Shewan a statement of his conversation with Mr. Savage. That involves two things; Mr. Shewan, in his conversation with Mr. Savage, stated that he was not the agent of the Atolia Mining Company, and that he was buying on his own account, and notified Mr. Savage to that effect. That is the question I asked Mr. Savage on cross-examination, and he denied it. The other part of the conversation was the details as to the purchase price, and all the details that went into the contract which is the basis of their cause of action. The receipt which they have here merely sets forth that he received this.

The COURT.—State your objection, Mr. Lamont.

Mr. LAMONT.—Counsel is apparently at the present time attempting to advance evidence as to representations so far as these particular concentrates are concerned. I object upon the ground that

(Testimony of W. H. Shewan.)

no such defense has been pleaded in the present action. There are four separate defenses.

The COURT.—What is the defense?

Mr. LAMONT.—The defenses allege a contract between plaintiff [69] in this action and Mr. Shewan. The affirmative defenses allege no contract between the plaintiff and the defendant. Then they attempt to set up fraud, or misrepresentation, in a separate contract to which the defendant in the present action is not a party. In other words, all four separate defenses attempt to avoid, they deny that any contract existed between plaintiff and defendant in the present action.

The COURT.—Then how are you interested in any fraud or misrepresentation?

Mr. ANDREWS: In this way: In the first part of the answer, we have taken the position that this gentleman was never our agent. It is claimed that Mr. Shewan was our agent. We have a right to plead inconsistent defenses. While we deny that he was our agent, and refuse to admit that such was the case, nevertheless, plaintiff so claims, and if the Court should find that he was our agent and the contract is binding on us—

The COURT.—That is rather a singular pleading; I doubt whether it is a good pleading.

Mr. ANDREWS.—I do not see, your Honor, how we could very well do anything else. If your Honor feels that, under the facts, he was our agent, then we have been damaged by misrepresentation.

The COURT.—You could not be damaged if he

(Testimony of W. H. Shewan.)

was not your agent. You have to stand on one thing or the other. You can, of course, put in inconsistent defenses.

Mr. ANDREWS.—That is what we are doing.

The COURT.—Well, there is no jury here. I will see what the evidence leads to.

Mr. LAMONT.—I urge the further objection in regard to the affirmative defense that—

The COURT.—Let me advise you that you must put in all your [70] objections at once; the Court cannot permit you to do it piecemeal.

Mr. LAMONT.—I can raise the same point in another way; to another question I can make an objection which will raise the same points.

The COURT.—You may state them, if you wish, but I do not want you to understand we try cases that way. If you have any objection to a question, you must make all your objections at the one time; you cannot submit one and have it overruled, and then attempt to interpose others.

Mr. LAMONT.—The other objections I will state to the Court so that your Honor will understand the ground of them and then I can urge them later on in regard to some other question.

The COURT.—I will let you interpose them here, but, of course, you will readily appreciate that that course violates the proper method of putting in evidence.

Mr. LAMONT.—In regard to the first and third defenses, counsel have apparently attempted to set up a rescission. They allege a tender back to the

(Testimony of W. H. Shewan.)

plaintiff of the sheelite concentrates in question, but that tender is made conditional upon us paying the freight, which they apparently incurred in sending the concentrates from Lovelock to Niagara Falls, which is a conditional rescission, and none other.

As to the second and fourth special defenses, they are apparently based upon damage, and are not pleaded in the way of a counterclaim at all. Those are the different objections to the defenses.

The COURT.—I will see what this leads to. I doubt whether that is a good defensive pleading. Proceed.” [71]

The WITNESS.—(Continuing.) I had a conversation with Mr. Savage relative to the purchase of this tungsten ore, around about the 20th of September I should say. On examining Plaintiff's Exhibit No. 1 it refreshes my memory and I would say the conversation took place about November 20, 1918, at the St. Anthony mine, Churchill County, Nevada. I think there was someone with Mr. Savage in his car, but I am not sure; my son and myself were there with Mr. Savage. Mr. Savage asked me if I was buying any scheelite concentrates and I said I was. He said he had about six tons down at his place, and I said, “What do you want for them?” He said, “I don't know; what will you give me?” I said, “I don't know; I can't say offhand; but around about \$21.50.” We stood there and talked for a little while. Mr. Savage said he thought he would take that. After a short conversation, he

(Testimony of W. H. Shewan.)

drove away. I offered him \$21.50 per unit.

Mr. ANDREWS.—Q. What was said, if anything, relative to the content of the tungsten that Mr. Savage was offering you?

A. That it must be over 60 per cent WO_3 and absolutely pure from all impurities, phosphorus and copper especially. Of phosphorus, .05 was a high as they could go. Mr. Savage said that the ore was absolutely pure, some of the best tungsten that he had ever shipped. I believe that Mr. Savage said he had an assay of the ore, an analysis of it. That was all that was said in that conversation. On the following morning I had a further conversation with Mr. Savage relative to this matter. That was November 21st. The conversation was over the telephone. I was at the St. Anthony Mine's office, at Fanning, Nevada; I believe Mr. Savage was at the Tungsten Mill, Humboldt County. He said that he would have to cancel the sale of that tungsten, that he thought he could do better. I said, "All right, Mr. Savage, that is up to you; if you can do better, all right, no harm done." That is all that was said in [72] that conversation. That afternoon again Mr. Savage called me up on the telephone, at about five o'clock, and he stated that he had reconsidered that, and he asked me if I would be able to take any more than the six tons. I said I thought I could handle it. He said he thought he would have around about twelve tons. He said, "If your offer still stands open, I will do business with you." I said, "All right, I will take it providing it is under the same

(Testimony of W. H. Shewan.)

rule as the other, absolutely free from impurities," and he said it was. I sent the telegram I have here in my hand in the evening shortly after I had the conversation with Mr. Savage. That was after I had agreed with Mr. Savage that I would buy these twelve tons of concentrates. The reason I sent that telegram to the Atolia Mining Company after I had already agreed to buy the tungsten concentrates from Mr. Savage was that I didn't want the company to make any arrangements to take any more ore that would overload the car, and I wanted to have room to put in the twelve tons. I knew that the Atolia Mining Company was filling up the car with some ore of the Pacific Tungsten Company. I was loading the car for them with my men. The Humboldt Tungsten Company's ore and Mr. Loring's ore and my own was going into the car. Prior to my having arranged with the Humboldt people to take their ore I knew that Mr. Loring's and my own ore was going into the car. By Mr. Loring's I mean the Pacific Tungsten Company's ore.

After the conversation of which I have just spoken I had further conversation with Mr. Savage every day, and I think the car was finished somewhere around the 28th or 29th. I remember signing this receipt which has been introduced in evidence here as Plaintiff's Exhibit No. 6. This document was drawn up in the [73] Humboldt Tungsten Company's office at Toulon, Nevada, I presume, by Mr. Savage. I think he wrote it on the typewriter, if I am not mistaken, or his clerk did. When I

(Testimony of W. H. Shewan.)

came to sign it, I seen that it was made in the name of the Atolia Mining Company; I said, "Mr. Savage, I have no right to sign anything connected with the Atolia Mining Company, as I am absolutely dealing on my own account with you, and I am not permitted to sign anything for the Atolia Mining Company." Mr. Savage said, "Mr. Shewan, we have nothing to show at all where our concentrates went to, it is merely a protection, I know that everything is all right, but it is a protection in case anything happens to you for us to trace the ore." Then I signed the document.

At the time I signed this document I signed another document.

The COURT.—Q. Why didn't you say to him that his purpose would be fully subverted by simply stating in there, "to be shipped with the concentrates belonging to yourself and other parties there." That would have identified where their ore was to go, wouldn't it?

A. It should have done so, yes.

WITNESS.—(Continuing.) I signed the original of the document which you show me at the same time that I signed Plaintiff's Exhibit No. 6, and I delivered the original of it to Mr. Savage.

The COURT.—(After examining the document.) I will let it go in merely for the purpose of affecting the question of the accuracy of the witness' memory.

The following document was then offered and admitted in evidence and marked "Defendant's Exhibit 'A.'"

(Testimony of W. H. Shewan.)

Defendant's Exhibit "A."

“Lovelock, Nevada, Nov. 29, 1918.

“Received from the Humboldt County Tungsten Mines and Mills Co. seventy-two sacks, containing eleven thousand and nine pounds Net (11,009 Lbs.) scheelite concentrates belonging to the Tungsten [74] Dyke Mining Co. and others. I hereby guarantee all milling charges as per attached statements amounting to \$2,567.70, same to be paid from first payment on above concentrates.

(Copy.)

W. H. SHEWAN.”

The WITNESS.—(Continuing.) I heard Mr. Savage this morning testify that he had had a conversation with me at his house at Toulon and that it was at that time that I negotiated for the purchase of the tungsten. My recollection in that regard is that I had a conversation with Mr. Savage after the tungsten had been sold. It was some time afterwards and he had made inquiry about the payment of it and I called at his place to tell him about it, to tell him that I had written to San Francisco about it; Mr. Savage was in bed. It was after these wires were sent out.

I wrote a letter dated November 22, 1918, which is the date of those telegrams and it is my signature, and sent it to Mr. Voorheis.

Counsel then offered in evidence a letter dated November 22, 1918, addressed to E. C. Voorheis, 1404 Humboldt Bank Bldg., San Francisco, and signed by W. H. Shewan, which was introduced in

evidence, marked "Defendant's Exhibit 'B,'" and which reads as follows:

Defendant's Exhibit "B."

"Toy, Via Lovelock, Nevada, Nov. 22d, 1918.

E. C. Voorheis,

#1404 Humboldt Bank Bldg.

San Francisco, Cal.

Dear Mr. Voorheis:

Yours of Nove 20th rec'd in which you state Mr. Loring has 24 or 25 tons ready for shipment, I have already made arrangements with the S. P. Co. for tomorrows Local to spot a car at Toulon on its way East, on Tuesday the local will bring the [75] car here I will complete loading and it will go out on an Eastern Train Tuesday night.

Regarding the 12 tons I wired you about I had made arrangements with Mr. Savage to take it at \$21.50 per unit, later he called me up and said he could get \$23.00 for it so I told him if he could get that he had better take it, my first agreement with Mr. Savage was for 6 tons, and he afterwards rang up and said he could make up 12 tons with some small lots he had on hand and I found out that the small lots was Mr. Beans who is associated with Mr. Beck.

Mr. Bean called me up by phone from Lovelock yesterday and asked if I had made arrangements with Mr. Savage to take that 5 tons, and I told him Savage said he could get a better price and I told him he had better take it, at any rate Mr. Bean

will call in person Monday to see you and if you have made any agreement with Mr. Beck you can let him know.

I note what you say regarding the Tungsten market, and I am very sorry to hear it as the mine is sure looking better than it ever did, I have just completed driving a tunnel on Tip Top #2, to cut the vein which gives me a stoping backs of about 80 ft., and yesterday we broke into the ore instead of gouging the mine as Mr. Hersey said in his report, I have sure developed as big a low grade Mine as there is in Nevada, and one that will stand the most rigid examination, I do not like to criticize as prominent a Geologist as he is but I must say that his practical education as a mining man has been sadly neglected, he speaks in his report of a marble stone in the contact this I have never found in the St. Anthony Mines yet, there is in the hanging wall 3 grades of a lime stone a white lime also black lime and a silicified lime shale stone and the foot wall is composed of blue and decomposed granite. [76]

The ore bodies very often fault and raise in the hanging or drop in the foot, that is where they lost the ore in driving west, however, I cannot understand why Mr. Hersey would have some one with him to show him the ore bodies as a man making a report on a mine, should be able to tell ore from waste.

I want to thank you for sending me Mr. Friedman's statement at the United States Senate he sure must have been quite a Joke before the com-

(Testimony of W. H. Shewan.)

mittee of Mines, and I think he would do much better back at his old original business selling Singer Sewing Machines thru the Humboldt Valley, I was told yesterday that there mill that was constructed by Freitag and Company, was giving them considerable trouble, but I guess that is to be looked for starting a new mill.

I will wire as soon as I make the shipment and will try and not omit anything this time on the shipping bill.

With kindest regards,

Yours very truly,

W. H. SHEWAN."

The WITNESS.—(Continuing.) I received from Senator Voorheis a letter dated November 20, 1918, which is the letter referred to in my previous letter ("Defendant's Exhibit 'B.'"), which is the following letter:

Defendant then offered the following letter, which was admitted in evidence and marked "Defendant's Exhibit 'C.'"

Defendant's Exhibit "C."

"San Francisco, Cal., U. S. A., Nov. 20, 1918.

Mr. W. H. Shewan,

Toyland, Nevada.

My dear Shewan:

I have your letter of the 16th and note what you say. I was just talking with Mr. Loring's office and he thought they had 24 or 25 tons of ore ready to ship and if that is the case I wish you would take

what you have, about 6 tons, up to the Toulon Mill so as to make a shipment of 30 tons, or such a matter whatever they have to go with your 6 tons. Mr. Loring is up there now and you may see him at Lovelock or at the Mill. [77]

I also note what you say in regard to the prospect that Mr. Clark had and it is just about as I expected it would turn out, no good.

You spoke of Mr. Savage having some for sale, see what you can buy it for and get a sample of it and if you can make anything on it, it is up to you. If you can get it cheap enough it could go in this car we are shipping but it would have to be tagged so as to keep the different lots separate.

The big car which was all of Loring's ore arrived to-day at Cleveland, so we will get returns inside of a couple of weeks.

I just received a wire from Loring stating that they have on hand nearly 18 tons and sufficient ore in the mill to produce 25 tons altogether which will wind up their milling at Toulon, so you will have a day or two to get your lot up there ready to ship. I sent you tags some time ago to attach to your lot. Loring's lot will not need any tags. Perhaps you can arrange when the ore is ready to ship to have the empty car drop off at your siding and you can load yours and then the car can be hauled to the Toulon Mill and finish loading.

Yours truly,

E. C. VOORHEIS.

ECV/M.

Will send you shipping papers to-morrow."

(Testimony of W. H. Shewan.)

The WITNESS.—(Continuing.) I received a letter dated February 13, 1919, addressed to myself and signed by Mr. Voorheis.

The counsel thereupon offered the letter which was introduced in evidence, marked "Defendant's Exhibit 'D,'" and reads as follows:

Defendant's Exhibit "D."

"San Francisco, Cal., U. S. A., Feb. 13, 1919.

Mr. W. H. Shewan,

Toy, Via Lovelock, Nevada.

My dear Shewan: [78]

We have been making up your account and enclose a copy to you which you will kindly check up and let us know if it is correct. We have given you credit for all the special lots which have been purchased at a profit and have given you the benefit of the purchases. The statement shows that you owe us \$2,740.38, that is you did not get out enough by that amount to pay the expenses, except less the value of the ore you sent to Mill City, which is now *en route* East but we cannot settle with that until we know what we are going to get for it. By the way, did you send a sample of that to Atolia so we can make an estimate of it? If not, and if you have a sample, please send it to Atolia.

The tungsten situation is in bad shape. We had a wire yesterday from New York stating that there were 6,000 tons of ore there from foreign countries, stored in New York which can probably be bought for ten dollars a unit, or even less. There have been

(Testimony of W. H. Shewan.)

some buyers down in the Atolia field buying surface ore which is picked up on the desert and they have offered five dollars a unit.

We have closed down tight at Atolia and do not know when we will be able to start up.

After looking over the statement *kindly* me know if you find the same correct.

Yours truly,

E. C. VOORHEIS.

ECV/M. ENC.”

The WITNESS.—(Continuing.) I received a letter dated February 17, 1919, addressed to myself signed by Mr. Voorheis.

Counsel offered said letter in evidence and it was introduced in evidence and marked “Defendant’s Exhibit ‘E,’ ” and reads as follows:

Defendant’s Exhibit “E.”

“San Francisco, Cal., U. S. A., Feb. 17, 1919. [79]
Mr. W. H. Shewan.

Toy, Via Lovelock, Nevada.

SHIPMENT LOT SA-13.

My dear Shewan:

We just received telegraphic advice from the East in regard to Lot shipped from Mill City for Niagara Falls which contained the following lots:

	Lot.	Bags.	Gross.	Tare.	Net.
Loring’s	#7	535	61106 lbs.	588 lbs.	60518 lbs.
Humboldt C. T.	#8	104	12035 “	124 “	11811 “
Beck & Bean	#9	82	11118 “	90 “	11028 “
Shewan’s	#SA13	140	14179 “	154 “	14025 “
		—	—	—	—
Total,		861	98438 “	956 “	97482 “

These two lots that you bought from Humboldt County Tungsten and from Beck & Bean ran so high in phosphorus it raised hell with the whole carload. The only two lots that are up to specifications are your Lot SA-13 and Loring's Lot #7. The other two will have to be thrown out and left at Niagara Falls until we can make proper disposal of them. I presume that you had understood with the Humboldt County Tungsten people that this ore was to be free *free* from phosphorus and the limit allowed us on phosphorus is .05%. That is the reason I wired you to-day to hold up the check we sent you to settle with Humboldt County Tungsten and I trust you have not given them the check. We will do the best we can for them but do not care to pay them for something that was misrepresented. Kindly advise us on receipt of this whether or not you have settled.

Yours truly,

E. C. VOORHEIS.

ECV/M.

ANALYSIS BY PITTSBURGH TESTING LABORATORY. [80]

	No. 7	No. 8	No. 9	No. SA13
MOISTURE	.049%	.066%	.04%	.10%
After Drying:				
TUNGSTIC ACID	68.45%	61.87%	63.60%	61.95%
PHOSPHORUS	.057%	.146%	.254%	.200%
SULPHUR	.046%	.397%	Trace	.152%

The WITNESS.—(Continuing.) I remember sending a letter to Mr. Voorheis dated February 20,

(Testimony of W. H. Shewan.)

1919, which was signed by myself.

Counsel offered said letter in evidence and it was introduced in evidence and marked "Defendants' Exhibit 'F,'" and reads as follows:

Defendant's Exhibit "F."

Fanning, Feb. 20th, 1919.

Mr. E. C. Voorheis,

#1404 Humboldt Bank Building,
San Francisco, Calif.

Dear Mr. Voorheis:

Yours of Feb. 17th received last night, also confirmation of wire to hold up payment on H. T. M & M. Company.

I note what you say regarding these two lots of Ore, they were both represented to me as being free from all impurities, and as Mr. Savage told me he had had an analysis of the ore, I thought we could depend on his word, as he certainly had handled enough Tungsten Ore to know what grade would be accepted.

I am returning check and statement of the Humboldt Tungsten Company, to you as advised by Mr. Morrish, and I can assure you that I am very sorry this has happened on account of my handling the affair.

With kindest regards, I am,"

Mr. ANDREWS.—Q. I show you a letter dated March 31, 1919, signed by Mr. Voorheis, and ask you if you received that letter. A. I did.

(Testimony of W. H. Shewan.)

Mr. ANDREWS.—I offer this letter in evidence.

Mr. LAMONT.—I object to it on the ground that the letter was written long after the controversy here involved was started.

The COURT.—The objection will be sustained to this letter. It is purely self-serving. [81]

Mr. ANDREWS.—The purpose of this is to show the relations between the parties.

The COURT.—That is disclosed.

Mr. ANDREWS.—May I offer this for identification, and may I have an exception to the ruling excluding it?

The COURT.—Yes.

(The letter excluded reads as follows:)

“San Francisco, March 31, 1919.

Mr. W. H. Shewan,
Lovelock, Nevada.

My dear Shewan:

I enclose herewith a letter and memorandum which we received from Mr. Savage in regard to his lot of ore which you agreed to take from him and which was included in the shipment over which we are having so much trouble, also a carbon copy of letter sent to Mr. Savage.

This matter is between you and Mr. Savage, as you were purchasing this ore for your own account and were to get the profit. The Atolia Mining Company was not interested in it at all and you had no authority to act for the Company in this matter, as we told you if you could purchase any outside ore

(Testimony of W. H. Shewan.)

and make a profit on it well and good, it would be for your account.

You can see Mr. Savage and explain this matter to him.

Very truly yours,

E. C. VOORHEIS."

DEFENDANT'S EXCEPTION No. 8.

Mr. ANDREWS.—I have here a letter, Mr. Shewan, dated May 10, 1919, written by you to Mr. Stent. Did you write that letter?

A. Yes. At that time I think Mr. Stent was the secretary of the Atolia Mining Co. [82]

Mr. ANDREWS.—I offer this letter in evidence.

Mr. LAMONT.—I object to it on the ground that it was written long subsequently to the happening of the matters involved in this case, and is immaterial, irrelevant and incompetent.

The COURT.—(After inspecting the letter.) The latter part of this has nothing to do with the case.

Mr. ANDREWS.—No, your Honor.

The COURT.—The objection is sustained.

Mr. ANDREWS.—I make the same offer for identification, and not an exception to the ruling.

The COURT.—Yes.

(The letter offered in evidence and rejected, read as follows:)

“ST. ANTHONY MINES LEASING COM-
PANY,

W. H. Shewan, General Manager.

Fanning, via Lovelock, Nevada, May 10th, 1919.

E. A. Stent,

#1404 Humboldt Bank Bldg.,

San Francisco, California.

Dear Mr. Stent:—

Yours of May 7th just rec'd and contents duly noted, and am enclosing you the two copy's of the agreement to the Humboldt County tungsten Mining and Mills Co. signed by me at the time of my purchasing the concentrates. These agreements were given by me at there request in case of anything happening to me between the time of purchase and the time of final settlement.

This was done in order to show who I was selling to and as I stated a protection to said company.

I am also having a copy of Lease sent under separate cover as per your request. [83]

I am very sorry that this trouble should arise and especially over concentrates purchased by me, but as I have stated several times before in my letters to your company, that Mr. Savage, gave his absolute guarantee that the concentrates was free from all impurities.

(Remainder refers to matters foreign to case.)

With very best wishes,

Yours very truly,

W. H. SHEWAN.”

(Testimony of W. H. Shewan.)

DEFENDANT'S EXCEPTION No. 9.

The WITNESS.—(Continuing.) I never offered \$23.50 per unit for the tungsten involved in this case, as Mr. Savage testified this morning.

Cross-examination.

The WITNESS.—I testified that I purchased these concentrates in order to complete a car and purchased them on my own account. The reason I was careful to give the amount purchased in my telegram of November 21st to Mr. Voorheis was to reserve space in the car for the ore. The price was given in that telegram so that they would book it and credit me with anything over what they sold it for.

I recognize the answer to the telegram which I have in my hand. When I got that answer I still thought I was buying it on my own account. The reason Mr. Voorheis said in his answer "must be free from impurities, would prefer to have sample analyzed first" was because he did not want any impure ore shipped in the carload he was shipping. It would make a great deal of difference if the ore was to be kept separate. He didn't want to make any impure purchases, and he didn't want to ship it to his people in the east. [84]

The lot purchased from Beck & Bean was partly bought through me and the company in San Francisco. It was divided in two lots and paid for in two lots, Beck & Bean and DeArmond. The entire lot went through my hands. I paid for all of it. I think the Atolia made out the statement to Beck

(Testimony of W. H. Shewan.)

& Bean, but I settled in Lovelock for it. No, some of the Beck & Bean lot was not purchased on the same basis as the lot involved in the present suit. Mr. Beck had been in the office in San Francisco and it was partly made through San Francisco and partly made through me up there. All of the Beck & Bean lot was offered to me for sale. You might say I was the purchaser because I settled for it. There is a distinction between the lot involved in this suit and the Beck & Bean lot as far as the purchaser was concerned. Mr. Beck had been at the Atolia office and I did not figure I was connected with it at that time, but they sent me a check and had me settle with those men at Lovelock, as there was a dispute between Beck & Bean and De Armond.

The Beck & Bean lot proper was not dealt with on the same basis as the tungstic acid involved in the present suit. The distinction was that the other that was bought of the Humboldt Tungsten Mines and Mills Company I purchased myself right from Mr. Savage.

Yes, I was wrong in saying a while back that the Beck & Bean lot, part of it, was upon the same basis as the purchase in the present suit. There were no other ores purchased at that time upon the same basis as the ore in the present suit. I think the ore in the present suit stood by itself, not at that time though, but previous to that. You might say all the other ore that went into this car stood on the same basis as this particular ore [85]

(Testimony of W. H. Shewan.)

bought from the Humboldt Tungsten Mines and Mills Company; mine stood on that basis and mine was in that car. The purchase of the other ores was just the same as mine. I sold mine to the Atolia Mining Company.

I do not remember a conversation on or about March 20, 1919, between myself and Mr. Savage in which he said to me, in words, or to the effect: "I understand the company has taken the position now that you are not their agent," nor that I replied to him, "Who else could I have been acting for?" Such a conversation never occurred.

The lot that is furnishing the subject matter of this suit went along in the same car with the other lots that were purchased by the Atolia Mining Company and were billed to the Atolia Mining Company under the same bill of lading. I was not making profits on all these different ores. I was making a profit on what I bought from Mr. Savage and not on any others in that shipment. My profit was the difference between the price paid Mr. Savage and the regular market, which was \$25 a unit at that time.

The check you show me marked "Plaintiff's Exhibit 4" was for Mr. Savage. That was just the amount due him. Yes, it came from the Atolia Mining Company as payment for Mr. Savage; it came to me.

I did not take samples of this ore prior to the date of sale. I did not take samples about four or five days or six or seven days prior to November

(Testimony of W. H. Shewan.)

29th. I took no samples prior to the 29th; I did during the time that we loaded the car. I sent those samples to the Atolia Mining Company at Atolia to be analyzed.

After sending those samples to the Atolia Mining Company I cannot remember the date of the next communication, from the Atolia Mining Company, but there was a communication that the samples had reached Atolia in very bad shape, some of them. [86] I know Mr. Pierson, of Lovelock, Nevada. No conversation ever occurred about the time these concentrates were shipped, in which I stated to Mr. Pierson that I was acting for the Atolia Mining Company. I had had many conversations with Mr. Pierson during that time, at the Mercantile Bank at Lovelock. I don't know that anybody else was present. At none of those conversations, did I ever state to Mr. Pierson that I was buying these concentrates and shipping this car for the Atolia Mining Company.

I did not have a conversation in the office of Mr. Savage at Lovelock a day or two after these concentrates had been shipped, in which Mr. Savage asked me whether I had communicated with the Atolia Mining Company to keep lots 1 and 2 separate. I don't remember that I had any conversation with Mr. Savage in his office shortly after these shipments had been made. There might have been a conversation after the time was up for payment on it, though I would not say definitely that no conversation occurred between myself and Mr. Savage in

(Testimony of W. H. Shewan.)

his office from the time these goods were shipped until the time of payment; I may have; I often stopped there in passing his place; if so, I do not remember anyone being present. I do not remember taking down the telephone during any one of those conversations and dictating a wire to the Atolia Mining Company. I would not say I did not. I would say that I did wire to the Atolia Mining Company not to mix the samples of lot 1 and lot 2.

Redirect Examination.

The WITNESS.—At the time that this conversation took place about mixing the samples I think the car was en route east. I remember having a conversation with Mr. Savage after this tungsten was shipped at Lovelock, Nevada, with reference to this particular transaction. I know it was after the car was shipped. It was at Lovelock, Nevada; just Mr. Savage and myself were present. I was coming out of the postoffice in Lovelock, Nevada, and Mr. Savage drove up in his car. I had heard at that time that he [87] had entered a suit against the Atolia Mining Company. I met him, and I said, “Mr. Savage, I see you entered a suit against the Atolia Mining Company.” He said, “Yes.” I said, “Don’t you think you are suing the wrong person?” He said, “No, I don’t think so; I am suing the men that got the concentrates and the men with the money.” I said, “All right, go ahead.”

Testimony of E. C. Voorheis, for Defendant (Recalled).

E. C. VOORHEIS, a witness previously sworn, was then called as a witness on behalf of the defendant, and testified as follows:

I was present of the Atolia Mining Company in 1917 and have been president of it ever since.

I had a conversation with Mr. Shewan some time in December, 1917, in my office relative to the purchase by Mr. Shewan of special lots of tungsten concentrates. This was somewhere about the holidays. Mr. Shewan was down from Nevada. He was not producing much ore under his lease and he suggested that he might be able to purchase outside ore and help fill up a carload, and that would get his ore to the market quicker than to hold it until he could accumulate a carload on his own lease. I told him he certainly could purchase such ores as he found would comply with our contracts, our Eastern contracts. We had at that time a contract for the delivery of 300 tons; the specifications in the contract were that the ore should contain not exceeding .05 phosphorus, must be 60% WO_3 , or tungstic acid, or better, and not more than one per cent sulphur, no copper. We had shipped the ore under this contract as we could get it, both from Atolia and from the St. Anthony mine. At that time I told Mr. Shewan he would have to be very careful in purchasing ore without a formal analysis; he must be sure that the ore was absolutely pure and not containing any detrimental elements that

(Testimony of E. C. Voorheis.)

would be rejected by the people whom we had contracted with. [88] That if he should buy any small lots of ore and could get them for a less figure than what we sold for under our contract, he should have the profit.

When we have contracts like that we aim to ship carload lots always; we never ship anything less than carload lots, from 30 to 40 tons; and when a car is shipped, we have a preliminary analysis; the cars are all billed to ourselves, to the Atolia Mining Company, at Niagara Falls, at Pittsburgh, or at any other place where the ore is sent. When the bill of lading is sent to us, we endorse the bill of lading, attach a sight draft for 90 per cent of our estimated value, that sight draft is cashed at the bank, and then we give Mr. Shewan the amount of money to pay for the ore which he had purchased.

The standard was that it should not contain more than .05 phosphorus, not over 1 per cent sulphur, and no copper, and should run 60 per cent or better WO_3 or tungstic acid.

Mr. ANDREWS.—Q. Why did you insist on Mr. Shewan having this ore come up to standard?

The COURT.—Because that is the character of the ore that he contracted for in the East?

The WITNESS.—(Continuing.) Yes, and if he got anything in the car that did not come up to the standard, as in this case, this whole car was rejected.

Thereupon counsel offered the following letter, also the document attached as part of said letter, in evidence, which were admitted, both marked "Defendant's Exhibit 'G,'" and read as follows:

Defendant's Exhibit "G."

“Chicago, March 22nd, 1919.

Atolia Mining Co.,
1404 Humboldt Bank Bldg.,
San Francisco, Cal.

Gentlemen: [89]

Your letter of March 11th, in reply to my wire of the 10th, just received.

We note our Lots L-1, and L-2, has been designated in your billing as special Lot No. 8, therefore, being mixed and sampled as one lot, which was absolutely contrary to our understanding with Mr. Shewan, as we furnished him separate control samples on lots one and two, and each lot being plainly designated as L-1 and L-2 also receipt which he signed plainly defines each lot, and as a further precaution requested Mr. Shewan to wire your Company that Lots L-1 and L-2 should not be mixed, as we know Lot L-2, carried impurities, but not having a complete analysis of this lot, the extent of impurities was not known.

We are also exceedingly sorry that we included any of our concentrates in your shipment, as we could have found ready market for same at that time, and could have prepared shipment in such manner as to have eliminated any chances of contaminating high grade lots with those carrying impurities.

You can readily see that we have been materially damaged by the mixing of these two lots, and in view of the fact that we took every available pre-

caution to have these two lots treated separately, but nevertheless the error was made, and through no fault of ours, therefore, we shall expect settlement on these lots as per our agreement with Mr. Shewan, and enclosed statement.

Hoping we may be able to arrive at an amicable settlement of the above difficulties,

Yours very truly,

HUMBOLDT COUNTY TUNGSTEN M. &
M. CO.

By L. A. SAVAGE,

Res. Mgr.

Counsel for the plaintiff admitted the foregoing letter was signed by L. A. Savage. [90]

“ATOLIA MINING COMPANY,

to

HUMBOLDT COUNTY TUNGSTEN M. & M.
CO., DR.

MEMORANDUM OF CONCENTRATES SOLD ATOLIA MINING CO.,

November 29th, 1918.

Lot L-1	Sacks	Gr. Wt.	Net Wt.	Assay	Phos.
	72	8809#	8723#	66.60	.037

8723 x 66.60 WO_3 =5809.518# WO_3

580.518# = 290.4759 Units

290.4759 Units @ \$21.00 per unit=

\$6100.00

Lot L-2	Sacks	Gr. Wt.	Net Wt.	Assay	Phos.
	32	3204#	3170#	61.60	Undeter- mined.

3170# x 61.60 WO_3 =1952.72# WO_3

1952.72# WO_3 = 97.636 Units

97,636 Units @ \$21.00 per Unit=

\$2050.35

Total,

\$8150.35.”

Counsel thereupon offered in evidence certificate of analysis of H. R. Mosley, chemist for the Atolia Mining Company and signed by said Mosley, which document was offered in evidence and reads as follows and marked “Defendant’s Exhibit ‘H.’”

(Testimony of E. C. Voorheis.)

Defendant's Exhibit "H."

"CHEMICAL RESEARCH LABORATORY.

Atolia Mining Company.

CERTIFICATE OF ANALYSIS.

Atolia P. O., San Bernardino Co., Cal.,

December 9, 1918.

Laboratory No. 2094, Submitted to us for analysis
contains:

2095

Sample of Sheelite Concentrates.

From Humboldt County Tungsten Co.

	% WO_3	% S.	% P.
Lot No. 1	69.50	.381	.045
Lot No. 2	62.00	1.140	.157

To _____

H. R. MOSLEY,
Chemist." [91]

The COURT.—Q. With reference to the departure of the car for the east, when were these control samples sent to you—before the car had left? A. No, the car was on the way.

Q. I gathered that there were samples delivered, according to the testimony of the witness Smith, several days before the shipment, and then there were samples also delivered on the day of the shipment.

Mr. ANDREWS.—Yes, your Honor, Mr. Smith testified he made two separate sets of samples, one some days prior to the 29th.

(Testimony of E. C. Voorheis.)

The COURT.—Yes, and he gave them to Shewan.

Mr. ANDREWS.—And Mr. Shewan denied that.

The COURT.—I didn't hear him deny it.

Mr. ANDREWS.—Yes. I asked him that question particularly, and he said the only samples he got were those on the 29th.

The COURT (to Mr. Voorheis).—Q. Would you permit Shewan to make purchases of ores to go to your correspondents in the east which were at variance with your requirements, and not require samples preliminary to their being shipped?

A. We could not get the samples until they were shipped; the samples were taken that day.

Q. The testimony here shows that samples were delivered before that day. Would you permit Shewan to put into your car anything that had not been demonstrated to you as being within the calls of your contract? A. No, not if we knew it.

Mr. ANDREWS.—Your Honor will remember the telegram that Mr. Voorheis sent in reply to Mr. Shewan's telegram; he expressly says in it, "We want the analysis before the stuff is shipped."

The COURT.—Certainly, I should think so.

Mr. ANDREWS.—But it so happened in this case that the goods were being shipped east while the samples were being sent down to the Atolia.

[92]

The COURT.—That is a question of fact, and there is evidence here the other way. I am inclined to think that the evidence of Smith is very reason-

(Testimony of E. C. Voorheis.)

able upon that subject, and that business men would not deal in any other way.

Q. Tungsten is used and was largely used during the war in the manufacture of steel, wasn't it Senator? A. Yes.

Q. Of course, I can understand that it would have to be of a grade such as they wanted it, such as they demanded. A. Yes.

Mr. ANDREWS.—Q. Senator, I show you a certificate of analysis from the Pittsburg Testing Laboratory, and I ask you if you know the signature of H. H. Craver?

A. Yes.

Q. Have you seen him write?

A. Oh, yes; he is the chief chemist in that laboratory.

Q. Is the Pittsburg Testing Laboratory the laboratory that made an analysis of this particular shipment in the east? A. Yes.

Q. Were lots 1 and 2 that were bought from the plaintiff, here, given any special designation when they were placed in the car? A. Lot No. 8.

The COURT.—Q. How did you know about that, Senator? You were not there, were you?

A. Where?

Q. Where they were put in the car.

A. No, but the papers were sent down to me.

Q. I thought they were put in the car separately?

Mr. ANDREWS.—It was like this, your Honor: Lots 1 and 2 were put in the car; they had a tag on them; this was special lot 8. [93]

(Testimony of E. C. Voorheis.)

The COURT.—Q. Who did that—Shewan?

A. Yes. You see, there were 800 sacks in this car; we use different colored tags for different lots. Warehousemen cannot always read, but they can see colors. That is the way we designate the different lots, by tags of different colors. This was designated Special Lot 8. I didn't know anything about there being lots 1 and 2.

Q. Then you had not received the telegram from Shewan that they should be kept separate?

A. If I had, I certainly would have had them kept separate.

Q. Why should Shewan telegraph to you about it anyhow, if he was buying it on his own account and simply had the privilege of shipping it in this same carload? Why would he telegraph to you? Why wouldn't he see to it himself about keeping them separate?

A. These were sold under our contract; Shewan had nothing to do with our contract.

Q. He had nothing to do with your contract in the east, at all: That is what you mean, is it?

A. That is what I mean. [94]

Mr. ANDREWS.—I offer in evidence this analysis of the Pittsburg Laboratory.

Mr. LAMONT.—This lot 8 that you have here, it is clearly understood is both lots 1 and 2?

Mr. ANDREWS.—It covers lots 1 and 2.

Mr. LAMONT.—An analysis on both lots?

Mr. ANDREWS.—Yes. It is as follows:

Defendant's Exhibit "I."

**"PITTSBURGH TESTING LABORATORY.
PITTSBURGH, PENNA.**

Established 1881.

COPY—May 5th, 1921.

Report No. 82229.

Client's Order No.—.

H. H. Craver,

Manager Chemical Department.

CERTIFICATE OF ANALYSIS.

February 11th, 1919.

Analysis of SHEELITE.

From Car 1 C. 140738.

Sampled by Pittsburgh Testing Laboratory Inspector at Electro Metallurgical Company, Niagara Falls, N. Y.

For Atolia Mining Company.

San Francisco, Cal.

Reported to E. J. Lavino & Company,
Philadelphia.

Mark.	Bags.	Gross.	Tare.	Net.
Lot #7	535	61106 Lbs.	588 Lbs.	60518 Lbs.
" #8	104	12035 "	124 "	11911 "
" #9	82	11118 "	90 "	11028 "
" #SA 13	140	14179 "	154 "	14025 "
Total,	861	98438 "	956 "	97482 "
	No. 7.	No. 8.	No. 9.	No. SA 13.
MOISTURE	.049%	.066%	.04%	.10%
After Drying:				
TUNGSTIC ACID	68.45%	61.87%	63.60%	61.95%
PHOSPHORUS	.057%	.146%	.254%	.021%
SULPHUR	.046%	.397%	Trace	.152%

PITTSBURGH TESTING LABORATORY,

H. H. CRAVER,

Manager Chemical Department.

(Testimony of E. C. Voorheis.)

State of Pennsylvania

County of Allegany,—ss. [95]

Before me, the undersigned authority, this day personally appeared Mr. N. A. Porter, who being duly sworn according to law, deposes and says that he is a Chemist employed by the Pittsburgh Testing Laboratory; that the above analysis was made by him; and that the same is true and correct to the best of his knowledge and belief.

NATHAN A. PORTER.

Sworn and subscribed to before me this 5th day of May, 1921.

L. O. GARNER,
Notary Public.

My commission expires March 7, 1925.

(The document was marked "Defendant's Exhibit 'I.'")

The WITNESS.—(Continuing.) That is the final analysis of the Pittsburgh Testing Laboratory.

I had charge of the sale of the ore of the Atolia Mining Company during the years I was its president. I am familiar with the market prices and the market requirements for Tungsten concentrates during that time.

Counsel thereupon offered in evidence a telegram signed by L. A. Savage dated March 19, 1919, addressed to Hon. E. C. Voorheis, 1404 Humboldt Bank Bldg., San Francisco, California. It was introduced in evidence marked "Defendant's Exhibit "J," and read as follows: [96]

(Testimony of E. C. Voorheis.)

Defendant's Exhibit "J."

"Please advise by wire if lots one and two were mixed if such is the case it was contrary to understanding of shipping agreements with your Mr. Shewan. We would be materially damaged if lot one was contaminated with other lots and we will expect settlement on lot one as per agreement and billing being forwarded in a few days.

L. A. SAVAGE."

The COURT.—Lot one contained 72 sacks?

Mr. ANDREWS.—Yes, your Honor.

The WITNESS.—(Continuing.) To be sure about the market standard I will state again that the tungstic acid should be 60 per cent or better, phosphorus not over .05% sulphur, not over 1.0% no copper. This ore was weighed and sampled by the Pittsburgh Testing Laboratory as per that certificate of analysis, and the people to whom we shipped the carload refused it on the ground that it contained phosphorus. The whole car was rejected on account of the phosphorus content.

The market price for tungsten concentrates at the time of this rejection. I could not say offhand—was in the neighborhood of \$10, maybe. This mineral dropped instantly the armistice was entered into and went down pretty much, and it has been out of sight ever since.

The car is still in the warehouse at Niagara Falls. The people refused to accept it and we are having a controversy about it now.

(Testimony of E. C. Voorheis.)

I remember Mr. Savage testifying this morning to a conversation in my office, in about February, 1919, in which he said he constantly referred to Mr. Shewan as "your Mr. Shewan." Well, I know he came in there, I don't remember just the date. He testified this morning that sometime in February, 1919, he had a conversation in my office at which some people were present, and in which he [97] constantly referred to Mr. Shewan as "your Mr. Shewan," and that I did not make any objection to that reference. I do not know that I remember any such conversation. I would not notice it. I suppose if he referred to Mr. Shewan as my Mr. Shewan he meant the Mr. Shewan who had our lease, or who had a lease from us.

Counsel thereupon offered a letter dated March 20, 1919, signed by E. C. Voorheis, president of the Atolia Mining Company, and sent to L. A. Savage and received by him, which was introduced in evidence and marked Defendant's Exhibit "K," which reads as follows:

Defendant's Exhibit "K."

"San Francisco, Cal., U. S. A., March 20, 1919.
Mr. L. A. Savage,
Reno, Nevada.

Dear Sir:

I am in receipt of your wire this morning as follows:

'Please advise by wire if lots one and two were mixed. If such is the case it was con-

trary to understanding of shipping agreements with your Mr. Shewan We would be materially damaged if lot one was contaminated with other lots and we will expect settlement on lot one as per agreement and billing being forwarded in a few days.'

And we enclose you confirmation of our reply.

On March 10th we received a wire signed 'Humboldt County Mines and Mills Company,' asking when settlement could be made on shipment of tungsten ore and I enclose you a copy of that letter thinking you not have been able to see it.

This matter has been very unfortunate all the way through and the car is still intact at Niagara Falls waiting adjustment, [98] as the 32 sacks which you allowed to go with your shipment and the 18 sacks which Beck & Bean allowed to go with theirs, ruined the whole car and the whole car has been rejected.

This is a matter you will have to take up directly with Mr. Shewan as this was his transaction, not ours, nor was he acting for us in the matter in any way.

We have sent him copies of the correspondence and he thoroughly understands the situation.

Yours truly,

ATOLIA MINING COMPANY,

By E. C. VOORHEIS,

President.

ECV/M. ENC."

(Testimony of E. C. Voorheis.)

Cross-examination.

The WITNESS.—(Continuing.) This assay was made by my company on the lot involved in this suit on December 9, 1918. I could not say that at the time I sent this check for \$7733.25 on February 5, 1919, that analysis had already been taken which has been introduced in evidence. I have testified that the date of the analysis of the two samples sent to the mill, marked No. 1 and No. 2 as December 9, 1918, and this letter enclosing the check for over \$7000 in settlement for the amount involved in this suit was sent on February 5, 1919. My company had the analysis before it at the time it sent the check to Mr. Shewan.

When the analysis was made by the Pittsburgh Testing Laboratory, which was the official analysis, the phosphorus was twice as high as it was from the sample you sent to the mine. The analysis of December 9th indicates that the two lots were examined separately. And the Lavino lot shows the mix, and about twice [99] as much phosphorus as the other sample.

Q. As a matter of fact, on your first sample, the phosphorus in lot 2, in those two assays, ran higher than the combined sample?

A. Yes, but when you take the average, it is twice as much.

The WITNESS.—(Continuing.) I had the analysis on lot 2 as 1.57 before me at the time the check was sent to Mr. Shewan. It is not a fact that we were paid for this ore by the Lavino Com-

(Testimony of E. C. Voorheis.)

pany. We received an advance on it which has never been returned. Everybody else whose shipment went into that car was paid except the Humboldt County Tungsten Mines & Mills Company, but they were paid before we knew they had so much phosphorus. The Beck & Bean lot was paid before it was known they had so much phosphorus. We would have held up payment on their lot had they not come around for the money quite so soon. Mr. Savage would have got his money if he had been there at the time, too, but when we got a wire that the phosphorus was so high that it was rejected, we stopped the check.

Redirect Examination.

The WITNESS.—There is a suit pending at the present time brought by Atolia Mining Company against Lavino & Co., and in that suit Lavino & Co. cross-complained for the return of this money. They paid 90 per cent of our estimated value of this carload, which was over \$70,000. They were owing us, then, somewhere about \$45,000 or \$50,000, and they refused to pay it, and a suit is pending. I had received the return on the assay made by Mr. Mosley down in San Bernardino County at the time I sent this check to Mr. Shewan and I will explain why I sent the check.

The car contained over 98,000 pounds of ore; this lot No. 2 was 3000 pounds of ore; the phosphorus content, according to the sample they sent us, the others in the car would absorb the [100] excess content as it went through; but when it was officially

(Testimony of E. C. Voorheis.)

sampled, the official sample showed twice the phosphorus in lot 8 than what their sample showed, and that was enough to kill it. The lot 1 showed in our analysis in Atolia, for phosphorus, .045, and for lot 2 it was .1 and some fraction. Lots 1 and 2 were analyzed together as one lot in Pittsburgh. My idea was that in the average of all in the car and not of the two lots the phosphorus content might come under .05.

The WITNESS.—(Continuing the following day.) I will explain to the Court how it was I sent that check for \$7000 to Mr. Shewan. Some of our shipments were cash upon bill of lading. This contract was payable 60 days after sight on bill of lading. The advance payment from the people whom this car was loaded to was not paid until January 29th. On, I think, February 5, after the advance payment had been made, I supposed the carload would be all right, and on the 5th, I think it was, I mailed the check for Mr. Savage, or to Mr. Shewan, I made the check out to Mr. Shewan so that he could pay for that lot, and I think on the 11th or 12th I got a wire that the lot was rejected, and the entire car was rejected, and then I wired Mr. Shewan to hold the check, as he had not delivered it.

Testimony of B. C. Clark, for Defendant.

B. C. CLARK, a witness called and sworn on behalf of plaintiff, testified as follows:

In 1917 and for part of 1918 until about the first

(Testimony of B. C. Clark.)

of July, 1918, I was superintendent and had charge of the office at the mine of the Atolia Mining Company, at Atolia. I was in charge of the mine at the time that samples were sent from Nevada from the Humboldt County Tungsten Mines Company to Atolia, San Bernardino County, to the Atolia Mining Company. [101] Yes, I remember the testimony of Mr. Smith yesterday that two sets of samples had been made by him and given by him to Mr. Shewan and that two sets of samples were made of lots 1 and 2. As superintendent of the mill and in charge of that part of the work at the mine at Atolia I received one lot of samples marked 1 and 2. I know of no others received down there.

Testimony of R. J. Pierson, for Defendant.

R. J. PIERSON, a witness, called and sworn on behalf of defendant, testified as follows:

I am connected with the Lovelock Mercantile Banking Company and was connected with that firm in the year 1918. I had many conversations with Mr. Shewan and Mr. Savage relative to this transaction involved in this action but whether it was in the year 1918 or not, I do not know.

Mr. ANDREWS.—Q. Do you remember at any of these conversations whether or not Mr. Shewan expressed himself as being the agent of the Atolia Mining Company?

Mr. LAMONT.—We object to that as immaterial, irrelevant and incompetent. There was nothing

(Testimony of L. A. Savage.)

brought out by my cross-examination that would warrant that question. [102]

The COURT.—You are not permitted to bolster up evidence on a mere collateral circumstance.

Mr. ANDREWS.—I appreciate that, your Honor. That is all.

The COURT.—He denied it, anyhow.

Mr. ANDREWS.—Yes, I know he did, your Honor.

Mr. LAMONT.—No questions.

Mr. ANDREWS.—That is our case.

Testimony of L. A. Savage, for Plaintiff (Recalled in Rebuttal).

L. A. SAVAGE, a witness, called and sworn on behalf of plaintiff, in rebuttal, testified as follows:

At the time when this memorandum of agreement was signed, which has already been introduced in evidence, Mr. Shewan did not make any objection to the manner in which that agreement was drawn. The agreement was signed as it was originally drawn. He read that agreement before signing it. He was right in my presence standing by my desk when I dictated the agreement.

Mr. LAMONT.—Q. Did you on or about February 16, 1919, receive this telegram (handing witness telegram)?

A. I did.

Mr. LAMONT.—I offer this telegram in evidence.
[103]

Mr. ANDREWS.—I object to it as immaterial,

(Testimony of L. A. Savage.)

irrelevant and incompetent. It is the same proposition, the statement by an agent as to the authority he may have had.

The COURT.—I don't understand this.

Mr. LAMONT.—You mean you don't understand what the telegram means?

The COURT.—What is this room in the Humboldt Bank Building?

Mr. ANDREWS.—That is the address of the mining company, your Honor.

The COURT.—What is the purpose of this?

Mr. LAMONT.—Simply to check up the situation and show that the plaintiff in this case was notified that payment had been awaiting them at the office, and was in Mr. Shewan's hands, sent by the Atolia Mining Company to him; in other words, it was a ratification of the transaction at that time.

The COURT.—I thought this sale was in 1918?

Mr. LAMONT.—It is, your Honor, but the money was sent in 1919.

The COURT.—Oh, yes, I see. This says: "Wire received. Have had settlement here for past week. Advise me whether to pay thru bank or not."

The balance is the address of the Atolia Mining Company. The objection is overruled.

Mr. LAMONT.—I need not read that again, I suppose?

The COURT.—No.

(The telegram was here marked "Plaintiff's Exhibit 8.")

Mr. LAMONT.—Q. I show you another telegram,

(Testimony of L. A. Savage.)

and ask you whether you received that on or about February 17th.

A. I did. Maybe I could explain the address point in that other telegram; that was in reply to a wire I sent Mr. Shewan asking him for [104] his company's address in San Francisco.

Mr. LAMONT.—I offer this telegram in evidence.

Mr. ANDREWS.—I object to this, your Honor, on the same ground, immaterial, irrelevant, and incompetent, any statements by Mr. Shewan are not binding on the company.

The COURT.—The objection is overruled.

Mr. LAMONT.—Your Honor has read this—I will not have to read it again?

The COURT.—No.

(The telegram reads as follows:)

Plaintiff's Exhibit No. 9.

Lovelock Nev 1120A Feb 17 1919.

L A Savage

Palace Hotel

San Francisco Calif

You had better call at Atolia Company's office
Some difficulty over concentrate being accepted.

W. H. SHEWAN,

11sOAM."

(The document was marked "Plaintiff's Exhibit 9.")

The WITNESS.—(Continuing.) I heard Mr. Shewan's testimony in regard to a conversation in which he stated: "Isn't it a fact you are suing the

(Testimony of L. A. Savage.)

wrong party," or some words to that effect: No such conversation, to my knowledge, occurred between me and Mr. Shewan. I did not ever represent or state to Mr. Shewan at any time that either of the lots of concentrates involved in this action were free from impurities. I did not ever state that they were the best concentrates that I had ever shipped.

Cross-examination.

The WITNESS.—As to whether I told Mr. Shewan that the concentrates had any impurities in them at all, I defined the two lots, lot 1 and lot 2; lot 1 I assured him was within the market. I said about lot 2 that I had but one analysis of it and it [105] showed impurities and I took every precaution possible to have the lots kept separate, and I also advised him if he thought there was any possible chance of that lot being mixed up or being rejected, to let it go. I told him that lot 2 carried .45% copper, according to the analysis, but the phosphorus was not determined. I told him these things at the time we were loading the lots in the mill, and before they were put in the car. This was not told to him after I made the sale. It was told him when we were loading the concentrates, on the 29th, or the 27th. The sale on that particular lot was finished when it was loaded in the car.

I said in my examination in chief that I had had a conversation with Mr. Shewan in my house, that I was ill, and that he came to me and asked me to sell to him my tungsten concentrates, and at

(Testimony of L. A. Savage.)

that time he asked me to sell them to him at \$23.50 per unit. After that conversation I had a conversation with him relative to the sale of this tungsten on the day of the loading. There may have been a conversation between the date of the conversation at my house and the date of the loading. At the conversation at my house no sale was consummated. He had no authority to act, and neither did I on that date. I testified that at the conversation at my house I expressed a willingness to sell for \$23.50, providing my superiors in Chicago ratified that, and that he was going to ascertain from the Atolia Mining Company whether they were willing to pay that price, and afterwards he came back and said they would pay \$21 a unit, and we agreed on that.

The conversation at which he and I agreed on \$21 a unit took place at his second offer. I think it was at the mill, the Humboldt County Tungsten mill; I think it was. I would not say positively it was at the mill. He might have notified me by phone.

I had conversations with Mr. Shewan out at the property of the St. Anthony mine relative to this particular transaction. I [106] remember that Mr. Shewan testified that I came out to the place at the St. Anthony mines on or about the 20th of November, and that I offered to sell him 6 tons of Scheelite concentrates, but I do not remember such a conversation; I never went out there. I am positive about that.

There was never any conversation by my telephon-

(Testimony of L. A. Savage.)

ing to him on the morning of November 21st in which I stated that I would like to withdraw my previous arrangement with reference to selling the ore at \$21 a unit. I never did have a telephone conversation with him about 5 o'clock or later on, in which I told him I had 12 tons and would like to sell it to him at \$21.

Mr. ANDREWS.—Q. Did you ever offer him 12 tons? A. I never did.

Q. Then if you never offered him 12 tons, what were those two receipts which you made out and which he signed on November 29th, what were they for?

A. One was for the concentrates he received from the Humboldt Tungsten Mines & Mills Company.

Q. How many tons did that represent?

A. Five and one-half tons, or something like that.

Q. Approximately 6 tons, wasn't it?

A. Approximately 6 tons; yes,

Q. And now, as to the other document which you made out and which he signed, and in which he acknowledged the receipt of certain concentrates belonging to the Tungsten Company and others: You remember that receipt, don't you? A. Yes.

Q. How many tons did that represent, approximately?

A. I don't recall just what that was. I recall the lot, but I do not recall the weights.

Q. I show you Defendant's Exhibit "A." How many tons does that represent?

A. Five and one-half tons.

(Testimony of L. A. Savage.)

Q. And those two, together, represent approximately 12 tons, [107] don't they?

A. Very close to it, yes.

Q. And aren't these the 12 tons you had talked to Mr. Shewan about selling him?

A. I might have given Mr. Shewan information that there were 12 tons of concentrates for sale in the mill, but not that I had the sale of it.

Q. Didn't you prepare this document, Defendant's Exhibit "A"?

A. I did for my own protection. Your Honor, could I explain that document?

The COURT.—Certainly.

A. (Continuing.) You will understand that we have been doing custom milling; the concentrates on this sheet, known here as the Tungsten Mines Company, belonged to some shippers of ore to our mill; their milling charges, freight charges, etc., were against this ore; when they made arrangements with Mr. Shewan about purchasing this ore, I drew this up to protect us, and also to have a receipt showing how many pound there were, to give to the men who owned the concentrate; this is merely a receipt to protect me, and to protect my company for the milling charges. That was a very common practice.

The ore represented by the receipt which his Honor holds in his hand, it is marked Defendant's Exhibit "A," and the ore represented by the receipt which I myself had signed for the ore for the plaintiff, constitute, together, very close to 12 tons.

I never in any of my conversations with Mr. She-

(Testimony of L. A. Savage.)

wan, offered to sell him 12 tons; I might have told him there were 12 tons for sale; I might have informed him of that. If he got that information, it is more than likely he got it through me, or he might have got it from the owners of the concentrates. I did not [108] have 12 tons for sale. This belonged to one of our customers, and on the order of this customer these concentrates were delivered to Mr. Shewan, and no doubt go to make up the 12 tons he refers to. This instrument was simply a receipt from Mr. Shewan holding himself responsible for the milling expenses, and also for the freights, etc. I would not permit the ore to go out until he had signed a guarantee as to the milling expenses; somebody had to guarantee the milling expenses.

I would not say that at the time of my conversation with Mr. Shewan at my house when I was ill that there was nothing stated at that time with reference to the quality or the grade of the tungsten concentrates I was willing to sell. More than likely there was. I cannot remember the conversation at that time. More than likely I did say something to him about the grade of either lot 1 or lot 2. I assured him that lot 1 was within the market and that my analysis of lot 2 showed it to be carrying impurities. I told him that lot 2 carried impurities and the percentage of copper was the only impurity I knew that was contained in the lot, and for that reason. I was afraid of it on account of phosphorus. I informed Mr. Shewan fully. I had an

(Testimony of L. A. Savage.)

analysis on one-half. There were two carloads. The first carload, after being milled, an analysis was taken of it. When the combined product of the two cars were milled, there had been no further analysis made. The first analysis of approximately one-half of lot 2 showed it to be above sixty per cent WO_3 , but carrying .45 of copper; I didn't have any analysis [109] as to phosphorus. I have been in the business of handling tungsten concentrates since October 20, 1916, and I am familiar with the demands of the trade in that particular. I know what the manufacturers will accept in the way of impurities. I knew at the time of the sale to Mr. Shewan that lot 2 did contain impurities. I did know that. I do not know whether I showed Mr. Shewan the assay which I had made, but I assured him that it was carrying .45 of copper. Whether I showed him the certificates of analysis, or not, I do not know. I probably told him; in fact, I know I did. As to the phosphorus content I told him I did not know what it was, because I did not know. I had an analysis on a part of the lot.

The deal was at no time definitely closed, that I would consider it closed, or himself either, until the concentrates were loaded. We talked about rejecting lot 2 in the mill, the advisability of letting it go in; the concentrates were shown to Mr. Shewan, he examined them, and we talked about them *pro* and *con*. We discussed the advisability of letting lot 2 go in; we discussed that very thoroughly. It was doubtful whether, by reason of its impurities, it

(Testimony of L. A. Savage.)

should not be placed in. That was the reason why I had him telegraph to the people that I claim he represented not to mix them. If the lot that carries the impurities happens to carry a high enough percentage of impurities, it will contaminate the lot that is fee. The objectionable thing was not placing them in a car together. It was mixing them for purposes of analysis. A lot with impurities would not contaminate so far as being placed in juxtaposition in the car. The concentrates were contained in double bags, and they were marked lots 1 and 2. That is a very common practice. I told Mr. Shewan of the existence of the impurities, as to the copper, prior to the execution of this agreement. [110]

Redirect Examination.

The WITNESS.—(Continuing.) This Defendant's Exhibit "A," the receipt signed by Mr. Shewan, in regard to 11,009 pounds of Scheelite concentrates, was a receipt meant to cover the Tungsten Dyke Mining Company's ore, otherwise known sometimes as the Beck & Bean concentrates, which went into the same car as the ore which furnishes the subject matter of this action.

Testimony of Joe Beane, for Plaintiff (In Rebuttal).

JOE BEANE, a witness called and sworn on behalf of plaintiff, in rebuttal, testified as follows:

I reside at Reno, Nevada, and on or about the 29th day of November, 1918, I had some dealings with Mr. Shewan in regard to the sale of some concen-

(Testimony of Joe Beane.)

trates which belonged to the Tungsten Dyke Mine.

Q. With whom were your dealings carried on, your negotiations?

Mr. ANDREWS.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—I will let the question be answered. To which ruling counsel for defendant excepted.

DEFENDANT'S EXCEPTION No. 7.

The WITNESS.—(Continuing.) Mr. Shewan.

Mr. LAMONT.—Q. When you received your statement of account, from whom did you receive it? A. From Mr. Shewan.

Q. Have you a copy of that statement, or the original? I believe I served a subpoena on you *duces tecum*. A. Yes.

Mr. LAMONT.—I offer this statement in evidence.

Mr. ANDREWS.—I object to it as immaterial, irrelevant and incompetent, it has nothing to do with this case.

The COURT.—As I said a while ago, where a question of agency in a particular transaction is in question, showing that the party has dealt as an agent for the one sought to be bound in other transactions of a similar character, it is always admissible as a circumstance.

Mr. ANDREWS.—He should have done that in his direct case. He is now trying to do that in his redirect case, and we have [111] no opportunity to meet it.

The COURT.—In his direct case he had no right to assume, excepting as your pleading foreshadowed

(Testimony of Joe Beane.)

it, that there would be any attempt to sustain that. When you do, then he is entitled to come back with corroborating circumstances. The fact is, this would not have been admissible on his main case.

Mr. LAMONT.—All I want to call the Court's attention to so far as this exhibit is concerned is the fact that it is on the letter-head of the Atolia Mining Company, and is headed "Atolia Mining Company, 1404 Humboldt Bank Building, San Francisco, California, to Beck & Bean, Dr.: Final invoice shipment lot special #9."

To which ruling counsel for defendant excepted.

DEFENDANT'S EXCEPTION No. 8.

(The document was here marked "Plaintiff's Exhibit 10" and is as follows:)

Plaintiff's Exhibit No. 10.

"ATOLIA MINING CO.

1404 Humboldt Savings Bank Building,
San Francisco.

San Francisco, Cal., Jan. 31, 1919.

Atolia Mining Company,

1404 Humboldt Bank Building,
San Francisco, California.

To

Beck & Bean, Dr.

Final Invoice Shipment Lot Special #9.

Tungsten Concentrates.

Shipped

Nov. 30, 1918. 82 sacks, gross weight11,118 lbs.
in Lot SA-13. Tare " 90 "

Net "11,028 "

Moisture .04% 4 "

Net Dry Weight.....11,024 "

[112]

5.512 tons @ 63.60% WO_3 ...350.5632 Units

350.5632 Units @ \$21.00....\$7,361.82

90% Paid 12/10/18..... 5,670.00

Balance Due\$1,691.82

(In ink:)2/6/19.

TUNGSTEN DYKE MINE.

By J. BEANE.

TOM DE ARMOND.

(In pencil:) R. J. PIERSON,

Witness.

E. & O. E.,

San Francisco."

Testimony of J. C. Smith, for Plaintiff (Recalled in Rebuttal).

J. C. SMITH, a witness called and sworn on behalf of plaintiff in rebuttal, testified as follows:

I testified that the tags of the Humboldt County Tungsten Mines & Mills Company were taken off at the time these concentrates were loaded into the car. Mr. Shewan had tags; his men changed the tags as they were loading in the concentrates.

Mr. LAMONT.—What did those tags say on them?

Mr. ANDREWS.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—I will let the question be answered. To which the counsel for defendant excepted.

DEFENDANT'S EXCEPTION No. 9.

A. There were several different colored tags that Mr. Shewan had with them, with "Atolia Mining Company" stamped on them with a rubber stamp.
[113]

Testimony of Frank B. Evans, for Plaintiff (Recalled in Rebuttal).

FRANK B. EVANS, a witness called and sworn on behalf of plaintiff in rebuttal, testified as follows:

Mr. Shewan did not, at the time this memorandum of agreement was signed, make any complaint as to the manner in which the agreement was drawn. The agreement was signed as originally drawn.

TESTIMONY CLOSED.

The foregoing was all the evidence in the case, and having been argued by counsel, the said Court rendered its opinion and decision in favor of the plaintiff and against the defendant as follows:

The COURT.—There is no doubt but what there are matters in the record, appearing in the correspondence, which might readily put the aspect upon this transaction that as between the Atolia Mining Company and Mr. Shewan, the Company was substantially acting as a selling agent for ores that Shewan should be able to buy,—he to have the profit upon such lots as he should buy. I gather that, under this contract of lease between Shewan and the Atolia, of the St. Anthony Mine, Shewan, during the time of holding under the lease, was getting out this product for the Atolia with which to fulfill their contracts taken with their Eastern correspondent. It would have been perfectly natural, if such were the fact—and, as I say, there are some circumstances indicating that, as between themselves, that was the relation,—it would have been perfectly natural, I say, for them, and would have been for their benefit as well as his, for him to be able to buy ostensibly on their account different lots of concentrates for the purpose [114] of filling their cars, so that they could get the better rates obtainable by reason of shipping carload lots instead of less-than-carload lots. As I say, there are circumstances that would tend to bear out that relationship as obtaining between the Atolia and Shewan. But we are not particularly concerned with that, except as it may bear upon the aspect that the transaction

took so far as the plaintiff was concerned. The plaintiff was not concerned with what may have been the real relations existing between Shewan and his principal, the Mining Company; the plaintiff was concerned only with knowing who it was dealing with. It is calling too strongly upon the credibility of any reasonable man, taking all this evidence into consideration, to say that the circumstance presented here, without any exception so far as the plaintiff was concerned, were not such as to authorize it to believe, and properly and justly so, that it was dealing with the Atolia in the sale of this property.

The letters commented upon by Mr. Andrews, passing between the president of the defendant and Mr. Savage, representing the plaintiff, after they had found that this consignment had been rejected by reason of impurities, do not militate against that view at all. It is the usual and most ordinary thing, among business men of fair disposition, to try and convince those dealing with them that they are not at fault in the transaction, and, therefore, they should not suffer the damage. That is what he was undertaking to do.

I see no escape from the conclusion, under all the facts disclosed—the pertinent facts disclosed by this transaction,—even apart from the language of the so-called receipt, which was in its nature a contract, that the Atolia Mining Company [115] held itself out to the plaintiff as the one it was dealing with, and for whom the ores were bought. That being so, equity and good conscience preclude them

from being exculpated from responsibility when a loss is incurred. It may have been, as between them and Mr. Shewan, Mr. Shewan's loss. But that is not for our consideration here. People dealing under such conditions must be aware of the fact that they are, in equity, and good conscience, precluded from taking a course which will mislead a third party dealing with them as to the relations in which they stand. And that was the case here.

Of course, I recognize that in the multifarious transactions of the world many instances arise where that feature of the transaction is not thought of until the time comes when a question of responsibility arises, and then it becomes very material.

This transaction was had in the midst of great stress, when every energy of the country was being put forth to successfully carry on the great struggle in which we were engaged; and, of course, I can readily see that people dealing as the Atolia Mining Company was—with the production of an article for the purpose of meeting one of the great demands of the war, they were doing everything they could to fulfill the demand for this valuable product. If their relations were as indicated, between themselves and Shewan, they were subordinate to the consideration of the attitude they were holding out to the plaintiff here as to what Mr. Shewan's real capacity was in the transaction, and they justified this plaintiff in believing it was dealing with the Atolia, whether it was in fact so intended or not. That being so, they must be held responsible.

Judgment will go, in accordance with the prayer of the complaint, in favor of the plaintiff. [116]

Thereafter, and on the 11th day of May, 1921, judgment was entered in favor of the plaintiff in said action and against the defendant in said action in the sum prayed for in this complaint herein, to which said ruling, order, decision and judgment the said defendant now excepts.

And now, within the time required by law and within the rules of this court, defendant proposes the foregoing as and for its bill of exceptions, and prays that the same may be settled and allowed as correct.

JOHN F. DAVIS and
W. S. ANDREWS,
Attorneys for Defendant. [117]

In the United States District Court, in and for the
Southern Division of the Northern District of
California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES AND
MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant and Petitioner.

Stipulation as to Correctness of Bill of Exceptions.

It is hereby stipulated and agreed that the above

and foregoing constitutes a true and correct bill of exceptions in the above-entitled action, and that the same contains all of the proceedings had and all of the evidence offered and received on the trial of said action, and all of the rulings of the Court made during the trial of said action, and that the same may be now settled and allowed as and for the bill of exceptions to such rulings, and to the decision of the Court herein.

Dated this 4th day of Oct., 1921.

CHICKERING and GREGORY,
Attorneys for Plaintiff.

JOHN F. DAVIS and
W. S. ANDREWS,

Attorneys for Defendant.

Pursuant to the above stipulation, the undersigned hereby certifies that the said bill of exceptions is in proper form and conforms to the truth and the same is hereby allowed and signed as a true bill of exceptions herein

(Sgd.) WM. C. VAN FLEET,
Judge.

Dated, Oct. 5th, 1921. [118]

[Endorsed]: Filed Oct. 5, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [119]

In the United States District Court, in and for the
Southern Division of the Northern District of
California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES AND
MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant and Petitioner.

Petition for Allowance of Writ of Error.

Atolia Mining Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the decision of the Court in the judgment entered therein on the 11th day of May, 1921, come now by Messrs. John F. Davis and W. S. Andrews, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error and that upon giving such security all former proceedings in this court be suspended and stayed until the determination of said writ of error by the United

States Circuit Court of Appeals for the Ninth Circuit.

JOHN F. DAVIS,

W. S. ANDREWS,

Attorneys for Defendant and Petitioner.

[Endorsed]: Filed July 18, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [120]

In the United States District Court, in and for the Southern Division of the Northern District of California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES AND
MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant and Petitioner.

Assignment of Errors.

Now comes Atolia Mining Company, defendant herein, and makes and files the following assignment of errors upon which it will rely in the prosecution of its writ of error in the above-entitled cause, and assigns errors in the decision and judgment in the proceedings herein as follows, to wit:

I.

That the order and judgment of the Court herein, directing that judgment be entered in favor of the

plaintiff as prayed for in the complaint, was and is error, and is hereby assigned as error.

II.

That the order and judgment of the Court herein, directing that judgment be entered in favor of the plaintiff for an amount which included the purchase price for the defective concentrates known as Lot 1, was and is error, and is hereby assigned as error.

III.

The ruling and holding of the Court herein that the plaintiff herein was entitled to a judgment against defendant in [121] any sum of money whatever, based upon the alleged cause of action set forth in said complaint, was and is error, and is hereby assigned as error.

IV.

The ruling and holding of the Court herein failing and refusing to order and enter judgment of nonsuit against plaintiff and in favor of the defendant, to which said ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

V.

The failure and refusal of the Court herein to order judgment against the plaintiff and in favor of the defendant for and on each of the separate defenses set forth in the answer of defendant was and is error, and is hereby assigned as error.

VI.

The ruling and holding of the Court herein that plaintiff might introduce evidence in plaintiff's case in rebuttal for the purpose of showing that defendant had held out W. H. Shewan as its agent and for

the purpose of showing ostensible agency and agency by estoppel was and is error and is hereby assigned as error.

VII.

The decision of the Court herein that defendant had held W. H. Shewan as its agent, and that defendant was estopped to deny said agency was and is error, and is hereby assigned as error.

VIII.

The decision of the Court herein that one W. H. Shewan was the agent of the defendant in the transaction involved [122] in this action and referred to in the complaint was and is error, and is hereby assigned as error.

IX.

The ruling of the Court herein refusing the admission of the mining lease dated November 15, 1917, between Atolia Mining Company, a California corporation, and W. H. Shewan, to which ruling of the Court defendant then and there excepted, was and is error, and is hereby assigned as error.

X.

The ruling and holding of the Court herein permitting the witness L. A. Savage to answer the question, "Q. Who did Mr. Shewan at that time say he was representing?" over the objection of defendant, to which ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

XI.

The ruling and holding of the Court herein admitting Plaintiff's Exhibit 6, over the objection of defendant, to which ruling of the Court defendant

then and there excepted, was and is error, and is hereby assigned as error.

XII.

The ruling and holding of the Court herein permitting the witness Savage to answer the question, "Q. Mr. Savage, do you remember a conversation which occurred on or about February 17, 1919, I believe, at 1404 Humboldt Bank Building, when a Mr. Beck was present part of the time and Mr. C. B. Nickel was present all of the time, and you and Mr. Voorheis were present all of the time?" over the objection of the defendant, to which ruling of the Court defendant then and there excepted, was and is error, and is hereby assigned as error.

XIII.

The ruling and refusal of the Court to permit the witness Savage, on cross-examination by defendant, to answer the [123] question, "Q. Mr. Savage, do you remember calling upon Mr. Shewan on or about the 20th day of November at the St. Anthony Mines, in your car, for the purpose of selling to him six tons of tungsten concentrates and offering to sell him six tons at that time?" to which ruling of the Court defendant then and there excepted, was and is error, and is hereby assigned as error.

XIV.

The ruling and holding of the Court herein in refusing to permit the defendant, in connection with the testimony of the witness Shewan, to introduce the lease, or any part of the lease, of November 15, 1917, in order to show the surrounding circumstances and relationship of the witness Shewan to the de-

fendant at the time certain telegrams between them were sent and received, to which ruling the defendant then and there excepted, was and is error, and is hereby assigned as error.

XV.

The ruling and holding of the Court herein refusing the defendant permission to introduce the letter dated San Francisco, Cal., March 21, 1919, from E. C. Voorheis to W. H. Shewan, Lovelock, Nevada, to which ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

XVI.

The ruling and holding of the Court herein refusing defendant permission to introduce the letter from W. H. Shewan, General Manager of the St. Anthony Mines Leasing Company, at Fanning, Nevada, to E. A. Stent, 1404 Humboldt Bank Building, San Francisco, California, dated May 10, 1919, to which ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

XVII.

The ruling and holding of the Court herein permitting [124] the plaintiff in connection with the testimony of the witness Savage for plaintiff in rebuttal to introduce the telegram of February 16, 1919, reading, "Wire received. Have had settlement here for past week. Advise me whether to pay thru bank or not," over the objection of counsel for defendant, to which ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

XVIII.

The ruling and holding of the Court herein permitting the plaintiff to introduce in evidence the telegram from W. H. Shewan, at Lovelock, Nevada, to L. A. Savage, at Palace Hotel, San Francisco, dated February 17, 1919, marked Plaintiff's Exhibit 9, over the objection of the defendant, to which ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

XIX.

The ruling and holding of the Court herein permitting the witness Joe Beane for plaintiff in rebuttal to answer the question, "Q. With whom were your dealings carried on, your negotiations?" over the objection of defendant, to which ruling the defendant then and there excepted, was and is error, and is hereby assigned as error.

XX.

The ruling and holding of the Court herein permitting plaintiff to introduce in evidence Plaintiff's Exhibit No. 10, over the objection of the defendant, to which ruling defendant then and there excepted, was and is error, and is hereby assigned as error.

WHEREFORE, this defendant prays that the order and judgment of said District Court in and for the Southern Division of the Northern District of California, Second Division, be reversed, and that it have such other and further relief in the [125] premises, based on this assignment of errors, as shall seem meet.

JOHN F. DAVIS and
W. S. ANDREWS,
Attorneys for Defendant.

[Endorsed]: Filed July 18, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [126]

In the United States District Court, in and for the Southern Division of the Northern District of California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES
AND MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant and Petitioner.

Order Allowing Writ of Error.

Upon motion of John F. Davis, Esq., attorney for the above-named defendant, and upon filing a petition for a writ of error and an assignment of errors,—

IT IS ORDERED that a writ of error be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein and that the amount of bond on said writ of error be and the same is hereby fixed at the sum of twelve thousand dollars (\$12,000), said bond to serve as a cost bond, and as a supersedeas bond on said writ of error, the trial judge being absent.

(Sdg.) WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed Jul. 18, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [127]

In the Southern Division of the United States Dis-
trict Court, in and for the Northern District of
California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES
AND MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant.

Prayer for Reversal.

To the Honorable, the Circuit Court of Appeals of
the United States for the Ninth Circuit:

Comes now the Atolia Mining Company, a corpo-
ration, plaintiff in error, and prays the Court to
reverse the judgment of the District Court of the
United States, in and for the Southern Division of
the Northern District of California, Second Divi-
sion, made and entered in the above-entitled cause
on the 11th day of May, 1921, and for such other
and further relief as may be required by the nature
of the cause.

JOHN F. DAVIS,
W. S. ANDREWS,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed Jul. 18, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [128]

In the United States District Court, in and for the
Southern Division of the Northern District of
California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES
AND MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant and Petitioner.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, Atolia Mining Company, a corporation,
as principal, and F. W. Bradley and E. A. Stent
as sureties, are held and firmly bound unto Hum-
boldt County Tungsten Mines and Mills Company,
a corporation, plaintiff in the above-entitled action,
in the full and just sum of Twelve Thousand Dol-
lars (\$12,000), lawful money of the United States,
to be paid to the said plaintiff, Humboldt County
Tungsten Mines and Mills Company, a corporation,
for which payment well and truly to be made we
bind ourselves and each of us, jointly and severally,
and our and each of our successors, representatives
and assigns, firmly by these presents.

Sealed with our seals and dated this 18th day of
July, 1921.

WHEREAS, the above-named defendant, Atolia Mining Company, a corporation, has sued out a writ of error in the United States Circuit Court of Appeals, in and for the Ninth Circuit, to reverse the judgment in the above-entitled action in favor of the plaintiff therein and against the Atolia Mining Company, a corporation, defendant therein, for the sum of Nine Thousand Three Hundred and 90/100 Dollars (\$9,300.90), One [129] Hundred Fifty-one and 45/100 Dollars (\$151.45) costs and interest.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Atolia Mining Company, a corporation, shall prosecute such writ of error to effect and answer all damages and costs if it shall fail to make good said plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, said Atolia Mining Company, a corporation, principal, has caused its name to be hereunto subscribed and its corporate seal to be hereunto affixed by officers thereunto duly authorized, and the said F. W. Bradley and E. A. Stent, sureties, have hereunto set their hands and seals this 18th day of July, 1921.

ATOLIA MINING COMPANY,
By F. W. BRADLEY,
Its Vice-president.
And by E. A. STENT,
Its Secretary.
F. W. BRADLEY.
E. A. STENT.

[Seal Atolia Mining Co.]

United States of America,
Northern District of California,—ss.

F. W. Bradley and E. A. Stent, being duly sworn, each for himself deposes and says that he is a freeholder in said District and is worth the sum of Twelve Thousand Dollars exclusive of property exempt from execution and over and above all debts and liabilities.

F. W. BRADLEY.

E. A. STENT.

Subscribed and sworn to before me this 18th day of July, 1921.

[Seal]

W. W. HEALEY,

Notary Public in and for the City and County of
San Francisco, State of California. [130]

The within bond is approved July 18, 1921.

WM. W. MORROW,

Circuit Judge.

[Endorsed]: Filed Jul. 18, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [131]

(Title of Court and Cause.)

(Praecipe for Record on Writ of Error.)

To the Clerk of Said Court:

Sir: Please prepare transcript on writ of error as follows:

Judgment-roll.

Bill of exceptions.

Plaintiff's original subpoena.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error.

Prayer for reversal.

Bond on writ of error.

Writ of error.

Citation on writ of error.

Stipulation and orders extending time to make,
serve and file bill of exceptions.

Order extending time beyond term of court for set-
tlement of bill of exceptions.

Praecipe.

JOHN F. DAVIS and
W. S. ANDREWS,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 6, 1921. Walter B. Mal-
ling, Clerk. [132]

In the Southern Division of the United States Dis-
trict Court, in and for the Northern District of
California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES
and MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINES COMPANY, a Corporation,
Defendant.

In the United States District Court, in and for the
Southern Division of the Northern District of
California, Second Division.

No. 16,243.

HUMBOLDT COUNTY TUNGSTEN MINES
AND MILLS COMPANY, a Corporation,
Plaintiff,

vs.

ATOLIA MINING COMPANY, a Corporation,
Defendant and Petitioner.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to
the Honorable, the Judges of the District Court
of the United States, for the Southern Division
of the Northern District of California, Second
Division, GREETING:

Because in the record and proceedings, as also in
the rendition of a judgment, of a plea which is in
the said District Court, before you, or some of you,
between Humboldt County Tungsten Mine and Mills
Company, a corporation, plaintiff, and Atolia Min-
ing Company, a corporation, defendant and plain-
tiff in error, a manifest error hath happened to the
great damage of the said defendant and plaintiff in
error, as by this complaint doth appear, and that,
being willing that error, if any hath been should
be duly corrected, and full and speedy justice done
to the parties aforesaid, and, in this behalf, do

the Northern District of the State of California, Second Division. Humboldt County Tungsten Mines and Mills Company, a Corporation, Plaintiff, vs. Atolia Mining Company, a Corporation, Defendant. Writ of Error. Filed Jul. 18, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

[Seal]

WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [136]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Humboldt County Tungsten Mines and Mills Company, a Corporation, Plaintiff, and to Chickering and Gregory, Its Attorneys, GREETING:

You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court, in and for the Southern Division of the Northern District of California, Second Division, wherein Atolia Mining Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. W. MORROW,
United States Circuit Judge for the Ninth Circuit,
this 18th day of July, A D. 1921.

WM. W. MORROW,
United States Circuit Judge. [137]

Receipt of a copy of the within and attached citation is admitted this 18th day of July, 1921.

CHICKERING & GREGORY,
Attorneys for Plaintiff.

[Endorsed]: No. 16,243. In the United States District Court, in and for the Southern Division of the Northern District of the State of California, Second Division. Humboldt County Tungsten Mines and Mills Company, a Corporation, Plaintiff, vs. Atolia Mining Company, a Corporation, Defendant. Citation upon Writ of Error. Filed Jul. 18,

1921. W. B. Maling, Clerk. By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: No. 3784. United States Circuit Court of Appeals for the Ninth Circuit. Atolia Mining Company, a Corporation, Plaintiff in Error, vs. Humboldt County Tungsten Mines and Mills Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed October 10, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

ATOLIA MINING COMPANY, a Corporation,
Plaintiff in Error,

vs.

HUMBOLDT COUNTY TUNGSTEN MINES
AND MILLS COMPANY, a Corporation,
Defendant in Error.

Order Extending Time to and Including September 16, 1921, to File Record on Writ of Error and to Docket Cause.

GOOD CAUSE BEING SHOWN, IT IS HEREBY ORDERED that the plaintiff in error may have to and including the 16th day of September, 1921, within which to file the record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, Calif., August 12, 1921.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals.

[Endorsed]: No. 3784. In the United States Circuit Court of Appeals for the Ninth Circuit. Atolia Mining Company, a Corporation, Plaintiff in Error, vs. Humboldt County Tungsten Mines & Mills Company, a Corporation, Defendant in Error. Order Extending Time to File Record on Writ of Error and to Docket Cause. Filed Aug. 12, 1921. F. D. Monckton, Clerk. Refiled Oct. 10, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

ATOLIA MINING COMPANY, a Corporation,
Plaintiff in Error,
vs.

HUMBOLDT COUNTY TUNGSTEN MINES
AND MILLS COMPANY, a Corporation,
Defendant in Error.

**Order Extending Time to and Including October 16,
1921, to File Record on Writ of Error and to
Docket Cause.**

GOOD CAUSE BEING SHOWN, IT IS
HEREBY ORDERED that the plaintiff in error
may have to and including the 16th day of Oc-
tober, 1921, within which to file the record on
writ of error and to docket the cause in the United
States Circuit Court of Appeals for the Ninth
Circuit.

Dated at San Francisco, Calif., September 8, 1921.

WM. W. MORROW,

Judge of the United States Circuit Court of
Appeals.

[Endorsed]: In the United States Circuit
Court of Appeals for the Ninth Circuit. Atolia
Mining Company, a Corporation, Plaintiff in Error,
vs. Humboldt County Tungsten Mines and Mills
Company, a Corporation, Defendant in Error.
Order Extending Time to File Record on Writ of
Error and to Docket Cause. Filed Sep. 8, 1921.

F. D. Monckton, Clerk. Refiled Oct. 10, 1921.
F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

ATOLIA MINING COMPANY, a Corporation,
Plaintiff in Error,

vs.

HUMBOLDT COUNTY TUNGSTEN MINES
AND MILLS COMPANY, a Corporation,
Defendant in Error.

**Order Extending Time to and Including November
15, 1921, to File Record on Writ of Error and to
Docket Cause.**

GOOD CAUSE BEING SHOWN, IT IS
HEREBY ORDERED that the plaintiff in error
may have to and including the 15th day of No-
vember, 1921, within which to file the record on
writ of error and to docket the cause in the United
States Circuit Court of Appeals for the Ninth
Circuit.

Dated at San Francisco, Calif., October 5, 1921.

WM. W. MORROW,
Judge of the United States Circuit Court of
Appeals.

[Endorsed]: No. —. In the United States Circuit Court of Appeals for the Ninth Circuit. Atolia Mining Company, a Corporation, Plaintiff in Error, vs. Humboldt County Tungsten Mines and Mills Co., a Corporation, Defendant in Error. Order Extending Time to File Record on Writ of Error and to Docket Cause. Filed Oct. 5, 1921. F. D. Monekton, Clerk. Refiled Oct. 10, 1921. F. D. Monekton, Clerk.

